SUPREME COURT OF QUEENSLAND

CITATION:	*Re: CGB* [2017] QSC 128
PARTIES:	**AAM AS LITIGATION GUARDIAN FOR CGB** (applicant) v **CJW** (first respondent) and **OAM** (second respondent) and **TJR** (third respondent) and **PAS** (fourth respondent) and **DAJ** (fifth respondent) and **ANNETTE CHILDS AS LITIGATION GUARDIAN FOR DAR** (sixth respondent)
FILE NO/S:	BS 5050/16
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	Orders 1-3 delivered on 14 July 2017; Order 4 delivered on 21 July 2017; reasons published 21 July 2017
DELIVERED AT:	Brisbane
HEARING DATE:	23, 24 February 2017
JUDGE:	Brown J
ORDERS:	**Orders delivered 14 July 2017** **The order of the court is that:** **1. The application for leave under s 22 of the Succession Act 1981 (Qld) to apply for an order under s 21 of the Succession Act is refused.** **2. These reasons are to be published in a de-identified form.** **3. The Costs of this proceeding are to be assessed on an**

indemnity basis and paid out of the assets of CGB.

Further order delivered 21 July 2017

The Court further orders that:

4. The file in this matter is to be sealed, and is not to be opened without an order of the Supreme Court of Queensland.

CATCHWORDS: SUCCESSION – MAKING OF A WILL – TESTAMENTARY CAPACITY – LOSS OR LACK OF CAPACITY AND STATUTORY WILLS – where CGB is an 83 year old man – where CGB does not currently have a will – where CGB gave will instructions but then stated he did not wish to pursue them – where he spoke to two solicitors about a will – where an application is brought pursuant to s 22 of the *Succession Act* 1981 (Qld) and an order is sought pursuant to s 21 of the Act authorising a statutory will to be made – where there are various interested parties with varying opinions on whether a statutory will should be made for CGB, and what terms would be in that will – whether the court should make an order authorising a will to be made, and, if so, in what terms

Succession Act 1981 (Qld), s 21, s 22, s 22(3), s23, s 24, s 24(d)

A Limited v J [2017] NSWSC 736, cited
Banks v Goodfellow (1870) LR 5 QB 594, cited
Deecke v Deecke [2009] QSC 65, cited
GAU v GAV [2016] 1 Qd R 1, considered
JW v John Siganto as Litigation Guardian for AW and CW [2015] QSC 300, cited
McKay v McKay [2011] QSC 230, cited
Mace v Malone [2011] QSC 49, cited
Re: D(J) [1982] Ch 237, considered
Re Fenwick [2009] NSWSC 530, followed
Re Keane: Mace v Malone (2012) 1 Qd R 319, cited
Re: Will of Jane [2011] NSWSC 624, cited
R v J [2017] WASC 53, cited
Re JT [2014] QSC 163, cited
RKC v JNS [2014] QSC 313, cited
Sadler v Eggmolesse [2013] QSC 40, cited
Van der Meulen v Van de Meulen [2014] QSC 33, cited
VMH v SEL [2016] QSC 148, considered
Re Matsis; Charalanhous v Charalanhous [2012] QSC 349, cited

COUNSEL: D A Skenner for the applicant
D Fraser QC for the first respondent
R Treston QC for the second respondent
G Radcliffe for the third respondent

P T Wilson for the fourth respondent
D J Morgan for the fifth respondent
R D Williams for the sixth respondent

SOLICITORS: CRH Law for the applicant
Connelly Suthers for the first respondent
K&L Gates for the second respondent
Cooper Maloy for the third respondent
MLDG Lawyers for the fourth respondent
Minter Ellison for the fifth respondent
Carman Lawyers for the sixth respondent

[1] **BROWN J**: This is an application for leave pursuant to s 22 of the *Succession Act* 1981 (Qld) ("the Act") and if leave is given, for an order pursuant to s 21 of the Act authorising a will to be made in terms identified in exh MAA1 to AAM's affidavit, filed 24 January 2017 or such other terms as may be stated by the court.

[2] The application for an order under s 21 was heard with the application for leave pursuant to s 22(3) of the Act.

Background

[3] The present application relates to CGB.

[4] CGB was born on 31 August 1933 and is now aged 83. He is a quadriplegic and has been since he was 40 years of age.[1] He originally resided at M Street, on the Gold Coast (M St). On 29 July 2014, he moved into VS Aged Care Facility at Robina. He has never been married. His health is apparently stable but that could change quickly.

[5] CGB is clearly a complex man. He established a lucrative empire after he became a quadriplegic. He conducted his business out of his house at M St, Broadbeach. In order to live at home, he had a live-in carer, PAS, and a personal carer, DAR, to get him out of bed and bathed in the morning and put him back in bed in the evening. Notwithstanding his accrued wealth, he was tight with money, the house at M St being described by one witness as looking like an "unkempt housing commission house".[2] He conducted his business from the lounge and was described as:

> "This is a man that spends his life sitting in a chair, looking with his back or head against a view, against a window, looking at a blank wall upon which was a series of paper writings, being the leases and exploration permits for his mining endeavours et cetera et cetera in big writing – in big writing. He did wear glasses but he was able to read. He never wrote himself. He could pick up a telephone, he was able to manage that, with one hand and sign his name but never write."[3]

[6] He has two children with whom he had no contact with until their adult years. His daughter made initial contact with him some three years ago and his son made contact with him in the nursing home. He did not develop a relationship with his daughter as a result of her contact. In the case of his son, it is unknown whether CGB had sufficient cognitive ability to appreciate that he was his son.

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1 This is how he has been described but it appears he could walk with assistance initially.
2 T1-85/28.
3 T1-69/18-24.

[7] The evidence indicates that he was a very private man who trusted very few people and did not develop any deep personal relationships. He was strongly independent and not an easy man to deal with on any level.

[8] He appeared to enjoy showing off his wealth and knowledge and particularly playing with solicitors. He thought that he was going to live forever or at least said that was the case. Despite numerous attempts by his advisors to get him to make a will for some 15-20 years, he did not make one and the present application has been brought about by the fact that he has still not made a will.

[9] In terms of his affairs, they are presently managed as follows, pursuant to an order of QCAT dated 7 April 2016:

(a) TJR has been appointed by QCAT as CGB's administrator with respect to:

(i) CGB's property at R Parade, Burleigh Heads (he was also appointed as administrator for the other R Parade, but that property has been sold);

(ii) CGB's property: the Red "CGB" Mine at Redland Bay;

(iii) a quarry owned by CGB at M Creek;

(iv) Plant and equipment on CGB's property;

(v) CGB's business entity for his quarries; and

(vi) CGB's account at the Bank of Queensland which contains a significant cash amount of $800,000.

(b) The Public Trustee is CGB's administrator for all other financial matters.

[10] On 24 October 2014 the Public Guardian was appointed as guardian for CGB to make a decision about the following professional matters:

(a) accommodation;

(b) with whom CGB has contact and/or visits;

(c) health care;

(d) provision of services; and

(e) legal matters not relating to CGB's financial or property matters.

The present application

[11] The original application in this matter was made on 19 May 2016 by TJR, who is administrator of a number of businesses that are owned and/or controlled by CGB. He brought the application on the basis that CGB had expressed an intention to make a will for himself in 2014 and expended an extraordinary amount of money with solicitors to do so. TJR believed it was only proper that there be an investigation of the circumstances and that CGB's wishes to have a will be explored.[4]

[12] DAR and DAL filed affidavit material shortly thereafter. On 13 October 2016 DAR applied to the court to have AAM appointed as CGB's litigation guardian to obtain a geriatrician's report and for TJR to file an affidavit containing the information required under s 23 of the *Succession Act.*

[13] On 26 October 2016 AAM was appointed litigation guardian for CGB for the proceeding.

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4 Affidavit of TJR, [69] (CFI 2).

[14] TJR indicated that as he had been identified as a possible beneficiary he wished to discontinue the proceedings.

[15] AAM was substituted as the applicant for the present application by an order made by Mullins J on 15 December 2016. Pursuant to that order, the litigation guardian, AAM, was directed to file an affidavit containing the information prescribed by s 23 of the Act to the extent that such information was not already provided in TJR's affidavit of 26 May 2016 and also a proposed will. She was ordered to serve the affidavit material on a number of parties.

[16] The following parties were served with the application and supporting affidavit material:

(a) DAJ: the daughter of CGB (fifth respondent);

(b) OAM: the son of CGB (second respondent);

(c) DAR: CGB's assistant and driver (sixth respondent);

(d) TJR: CGB's accountant and long-term adviser and friend (third respondent);

(e) PAN: CGB's mortgage broker and who assisted him in a financial venture;

(f) Mr Kevin Copely: CGB's solicitor of some years ago;

(g) CJW: CGB's brother; and

(h) PAS: CGB's carer and alleged de facto.

[17] Affidavit material was also filed on behalf of parties served with copies of the application and supporting affidavit material. Affidavit evidence was filed on behalf of DAJ, OAM, PAS and CGB. PAN and Mr Copley did not appear.

[18] The applicant also subpoenaed solicitors, Mr Cameron Marshall and Mr Bill Ross, who gave oral evidence as to their dealings with CGB in relation to the question of a will.

[19] Legal representatives for DAJ, OAM, DAR, TJR, CJW and PAS appeared at the hearing as well as the legal representatives of AAM. There was no consensus of position between the parties.

[20] At the hearing only Mr Marshall, Mr Ross and TJR were cross-examined.

The Legislation

[21] Section 21 of the Act confers a discretion on the Supreme Court of Queensland to authorise, *inter alia*, the making of a will in terms stated by the court on behalf of a person without testamentary capacity. Section 21 provides:

> "21 Court may authorise a will to be made, altered or revoked for person without testamentary capacity
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> (1) The court may, on application, make an order authorising—
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> (a) a will to be made or altered, in the terms stated by the court, on behalf of a person without testamentary capacity; or
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> (b) a will or part of a will to be revoked on behalf of a person without testamentary capacity.
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> (2) The court may make the order only if—

(a) the person in relation to whom the order is sought lacks testamentary capacity; and

(b) the person is alive when the order is made; and

(c) the court has approved the proposed will, alteration or revocation.

(3) For the order, the court may make or give any necessary related orders or directions.

(4)The court may make the order on the conditions the court considers appropriate.

(5) The court may order that costs in relation to either or both of the following be paid out of the person's assets—

(a) an application for an order under this section;

(b) an application for leave under section 22.

(6) To remove any doubt, it is declared that an order under this section does not make, alter or revoke a will or dispose of any property.

(7) In this section— person without testamentary capacity includes a minor."

[22] The leave of the Supreme Court is required for a person to apply for an order under s 21. This is provided for in s 22:

"22 Leave to apply for s 21 order

(1) A person may apply for an order under section 21 only with the court's leave.

(2) The court may give leave on the conditions the court considers appropriate.

(3) The court may hear an application for an order under section 21 with or immediately after the application for leave to make the application."

[23] The court may only give leave under s 22 if it is satisfied of the five matters in s 24 of the Act, namely that:

(a) the applicant for leave is an appropriate person to make the application;

(b) adequate steps have been taken to allow representation of all persons with a proper interest in the application, including persons who have reason to expect a gift or benefit from the estate of the person in relation to whom an order under section 21 is sought;

(c) there are reasonable grounds for believing that the person does not have testamentary capacity;

(d) the proposed will, alteration or revocation is or may be a will, alteration or revocation that the person would make if the person were to have testamentary capacity; and

(e) it is or may be appropriate for an order to be made under section 21 in relation to the person.

[24] In considering whether those matters are satisfied, the court has the benefit of the evidence that must be provided to the court by an applicant pursuant to s 23 of the Act. This evidence was provided in the present case by way of affidavit evidence initially by TJR and then by AAM, the litigation guardian for CGB.

[25] The Court of Appeal in *GAU v GAV* [5] stated:

> "The court undertakes the enquiry with regard to information provided to it pursuant to s 23. As Lindsay J also observed, that information is designed to allow the court to be placed in the position to make broad evaluative judgments about the personal, and family, circumstances of the person alteration of whose will is sought (footnote omitted)…..
>
> > [52] Thus, the assessment at the leave stage of appropriateness of making an order under s 21 is made objectively with reference to the matters given to the court pursuant to s 23 and such other matters as the court considers relevant. Importantly, it is undertaken with conscious regard for the fact that making an order under s 21 is an exercise of a jurisdiction which is protective in nature and informed by what is for the benefit, and in the interests, of the person who requires protection."

[26] Section 25 of the Act provides:

> "25 Hearing an application for leave or for an order
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> On the hearing of an application for leave under section 22 or for an order under section 21, the court -
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> (a) may have regard to any information given to the court under section 23; and
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> (b) may inform itself of any other matter relating to the application in any way it considers appropriate; and
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> (c) is not bound by the rules of evidence."

Nature of jurisdiction

[27] The introduction of statutory provisions for statutory wills did not occur in Queensland until 2006. This followed a national review under the leading auspices of the Queensland Law Reform Commission.[6] The provisions were based on English legislation but with some significant changes. While it was intended that the succession laws, including with respect to statutory wills, would be uniform throughout Australian States, that did not in fact occur. In particular, in the context of statutory wills, the test often described as the "core test" that has to be satisfied with respect to the proposed differs between the various Australian jurisdictions.[7] In Queensland, the core test and one of the pre-conditions for leave is that "the proposed will … is or may be a will … that the person would make if the person were to have testamentary capacity".[8] That wording differs from other States such as New South Wales and Victoria.[9]

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5 [2016] 1 Qd R 1 at [50] and [52].

6 *Sadler v Eggmolesse* [2013] QSC 40.

7 *Sadler v Eggmolesse* [2013] QSC 40.

8 *Successions Act* 1981 (Qld), s 24(d).

9 See Williams and McCullough, 'Statutory Will Applications' LexisNexis Butterworths Aust 2014, at [2.10] which compares the different working as at 1 November 2013.

[28] According to the Court of Appeal in *GAU v GAV*,[10] there are two discretionary powers to be exercised by the court in relation to an application authorising a will:

(a) The requirement for leave for a person to apply for an order under s 21. The power to grant leave is thereby given to the court to be exercised or not exercised at the court's discretion, but in accordance with the provisions of the Act. Section 24 imposes a substantial constraint upon the exercise of the discretionary power to grant leave; and

(b) If leave is granted, the discretionary power conferred under s 21 by which the court may authorise, *inter alia*, a will on behalf of a person without testamentary capacity. The exercise of that power is constrained by the provisions of s 21(2).

[29] The jurisdiction is a protective one. At [48] the Court of Appeal in *GAU v GAV* stated that:

> "[48] Both discretionary powers are contained within subdivision 3. It confers a jurisdiction which is protective in nature and is informed by the protective jurisdiction historically exercised by the court over persons without testamentary capacity. As Lindsay J of the New South Wales Court of Appeal observed recently in *Secretary, Department of Family & Community Services v K*,[11] that jurisdiction is purposive; the purpose being, at its highest level of abstraction, protection of a person in need of protection. So grounded, the jurisdiction is broad in scope and flexible in nature. Its guiding principle is that whatever is done, or not done, for or on behalf of the person in need of protection must be for the benefit, and in the interests, of that person."

[30] Jackson J stated in *Van der Meulen v Van de Meulen*:[12]

> "In the application of a general discretion … against the background of the statutory qualifying factors, it is of no assistance to articulate factors which influence or decide this particular case as though they have a legal significance beyond the exercise of the discretion in the particular circumstance."

[31] In relation to similar legislation in New South Wales, Palmer J in *Re Fenwick*[13] discussed the genesis of the legislation and analysed the English legislation and English authorities. At [148] his Honour said of the approach that should be adopted with respect to the New South Wales legislation:[14]

> "My somewhat elaborate review of the UK decisions and the Victorian cases will show, I hope, that in interpreting and applying s 22(b) of the New South Wales Act, this court should not attempt to seek guidance from earlier authority. In interpreting s 22(b) this court should start 'with a clean slate'; it must interpret the words of the section in the light of the problems and difficulties which the legislation seeks to remedy, bearing in mind that legislation of this

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10 [2016] 1 Qd R 1 at [46]-[47].

11 [2014] NSWSC 1065, [60], [61].

12 [2014] QSC 33, [51] which was adopted by McMeekin J in *JW v John Siganto as Litigation Guardian for AW and CW* [2015] QSC 300 at [217] and A Lyons J in *Re JT* [2014] QSC 163.

13 [2009] NSWSC 530.

14 Which was approved by Atkinson J in *Sadler v Eggmolesse* [2013] QSC 40.

> kind should receive a benevolent construction: see, for example, *Roberts v Repatriation Commission* (1992) 111 ALR 436, at 440; *Parramatta City Council v Shell Co of Australia Ltd* [1972] 2 NSWLR 632 at 634-635 per Manning JA; *Re Dominion Insurance Company of Australia Ltd and the Companies Act* [1980] 1 NSWLR 271 at 274, per Needham J."

[32] Palmer J identified three categories of cases where a relevant person is without testamentary capacity and which succession law could not necessarily deal adequately with or at all by way of family provision legislation[15] and to which the power to make a statutory will was directed :

(a) The "lost capacity" cases such as:

i. where a person loses testamentary capacity having made a will and there is a change of circumstance after the relevant person loses testamentary capacity which would have affected the terms of the will made, such as, for example the death of a major beneficiary and there may be total or partial intestacy if no-one can make an application under the family provision legislation;

ii. where a person having had testamentary capacity loses capacity before making a will and a distribution on intestacy would produce a result that the person could never have intended;

(b) The "nil capacity" cases where someone has never had testamentary capacity and there is no "eligible person" who can make a claim under family provision legislation on the death of such a person intestate; and

(c) The "pre-empted capacity" cases where someone, though still a minor and therefore lacking testamentary capacity, was old enough to form relationships and to express reasonable wishes about property before losing capacity.

[33] The present case is a case of lost capacity.

Information in support of the Application – s 23

Basis of Application

[34] AAM makes the application on the basis that it is her opinion that largely on the basis that CGB consulted Mr Marshall, and gave instructions for a will, albeit they were subsequently revoked, as well as Mr Bill Ross, CGB was concerned to make a will and expressed some testamentary intentions. AAM provides her opinion on the basis of her review of the material as an experienced solicitor in estate law and has no personal knowledge of the events.

Size and character of the Estate

[35] The original estimate of the estate was some $30,000,000[16] based on information provided by the Public Trustee. However it became apparent from the evidence of TJR that there was some duplication of assets in the schedule prepared. A revised combined balance sheet, which was the best that TJR could provide in the short period of time he was given, estimated the net position to be $17,357,557.[17]

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15 [2009] NSWSC 530, [24] – [28].
16 Affidavit of AAM, exh 2 (CFI 32).
17 Exhibit 4.

[36] Exhibit 4 sets out the position as best as TJR could do as at 24 February 2017 as follows:

"**Current Assets – [Company] Pty Ltd…**	
Cash at Bank – [Company] Pty Ltd Bank Acc	$ 62,688.00
Cash on hand – [Company]	$2.00
Council Bond – Gatton Shire Council [Company]	$7,500.00
GST Refund	$11,292.00
Freehold land – M Creek	$617,196.00
Plant (Machinery)	$1,216,000.00
	$1,914,678.00
Current Assets – CGB	
Cash at bank	
ANZ Bank	$80.00
BOQ Cash management account	$746,403.00
PTQ Term Investment account	$3,264,851.00
PTQ Working Account	$19,320.00
Solicitors Trust Account	$484,282.00
GCCC Rates Retention amount	$1,000,000.00
	$5,874,936.00
Shares in [Company]	**$1,050,000.00**
Accommodation Bond to Allity ([VS Aged Facility])	**$450,000.00**
Land & Buildings	
[R] Parade, West Burleigh (Factories)	$7,077,737.00
[G] Road, Redland Bay (Red "CGB" Mine)	$250,000.00
[M] Creek Land (from where [Company] operates)	$280,000.00
	$7,607,737.00
Plant & equipment at Cost	**$473,348.00**
Total Assets	**$17,370,699.00**."

[37] The estimated value of assets are on the basis that they estimate the value of the assets as a growing concern. They do not therefore take account of potential significant liabilities.

[38] TJR gave the following evidence about the state of the assets:

(a) the Red "CGB" Mine which is a quarry is running out of its useful life and there have been significant show cause notices from the Council and the Department of Natural Resources and Mines. He has applied for a change of use to have a transfer station installed to provide an ongoing income. If that does not occur he estimates the rehabilitation costs will be $2-3 million dollars;[18]

(b) the property at M Creek is operated by Company Pty Ltd. It mines sandstone was poorly maintained but significant investment has been made in new equipment to ramp up production and identify new buyers.[19] If shut down there would be rehabilitation costs estimated to be in the millions;

(c) the property at 12 R Parade is a rental property which consists of 10 Units. Each unit is a separate business. It had to have a significant amount spent on it to bring it into good repair and is now fully tenanted and regular rent is being received. The property at 23 R Parade was sold for $7.4 million at the direction of the public trustee to provide for funds for the ongoing maintenance of the estate and CGB's care and the other R Parade remains;[20]

(d) in 2016 the income from CGB's assets recorded a loss[21] but he expects a profit of $500,000 for this year;[22]

(e) M Creek may be a post capital gains asset and the Red "CGB" Mine is a post capital gains asset;[23] and

(f) there are ongoing costs being paid for the Public Trustee's fees, accountancy fees, legal fees and the cost of CGB's care.

[39] TJR's solicitors also informed AAM that there was an ongoing dispute with the Council as to rates.[24] That resulted in a judgment in favour of the Council for a significant sum and the question of an appeal was being considered.[25]

[40] I accept the estimate of TJR. He has considerable knowledge of the workings of CGB's estate. TJR has been CGB's accountant for many years and is presently administrator of part of his estate for which he prepares accounts. He also prepares CGB's tax returns.

Proposed Will

[41] The draft proposed will provides for the following,[26] that:

(a) PAN be appointed as executor;

(b) A legacy is given to PAS in the sum of $450,000;

(c) DAR is given a legacy of $350,000;

(d) A legacy is given of $100,000 to TJR;

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18 T2-4/15-47 and T2-5/1-5.
19 T2-5/12-47.
20 T2-8/25-41.
21 T2-22/20-24.
22 T2-23/30-32, which is pre-tax.
23 T2-23/1-24.
24 Affidavit of AAM, exh 4 (CFI 32).
25 *Trevorrow v Gold Coast City Council* [2017] QSC 12.
26 Affidavit of AAM, exh 1 (CFI 32).

(e) A legacy of $50,000 is given to PAN;

(f) There is an education fund created for PAE in the sum of $100,000; and

(g) The residue of CGB's estate goes to a testamentary trust, The CGB Trust.

(h) In terms of the beneficiaries of The CGB Trust it is proposed that they be:

(i) CJW and if CJW does not survive CGB, CJW's children;

(j) A charity, namely the Spinal Research Institute Ltd;

(k) DAJ and if DAJ does not survive CGB, DAJ's children; and

(l) OAM and if OAM does not survive CGB, OAM's children.

[42] It is proposed that the income is payable to each of the trust's beneficiaries equally and upon winding up of the trust the capital is to be distributed equally. It had been proposed that the Public Trustee would be the trustee of the testamentary trust but the Public Trustee declined the role and it was proposed that TJR, CGB's administrator, be appointed. TJR has indicated he is willing to do that.[27] PAN and his son also indicated that they would be prepared to act as trustees.[28]

CGB's testamentary wishes

[43] Evidence as to CGB's wishes was largely provided by the evidence of Mr Cameron Marshall and Mr Bill Ross. Both gentlemen are solicitors who met with CGB to discuss the making of a will.

[44] Mr Marshall was a solicitor with Robbins Watson Solicitors. He had discussions with and met with CGB between September 2013 and November 2013. The file notes of his meetings and discussions with CGB is exhibited to AAM's affidavit as is a summary of their interactions.[29]

[45] Mr Ross is a partner with Collas Moro Ross. He had been CGB's solicitor and known him for some 20 years. Mr Ross met and had discussions with CGB between 3 April 2014 and 20 May 2014. His file and a summary of his interactions with CGB is exhibited to AAM's affidavit.[30]

Interactions between Mr Marshall and CGB

[46] Mr Marshall made considerable notes of his various telephone discussions and meetings with CGB. His evidence was dispassionate and I accept the evidence he gave was accurate.

[47] Mr Marshall was contacted by PAS who handed the phone to CGB about making a will on 12 September 2013. Mr Marshall had worked for Mr Ross and had had contact with CGB some years before. He had some familiarity with CGB's personality which he found was a difficult one. Mr Marshall was particularly concerned because CGB told him that he did not have a will, had been in hospital and was 80. He made note that capacity was an issue and CGB would have to get a medical certificate in this regard. CGB told Mr Marshall that he did not have a usual general practitioner.

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27 PAS opposes TRJ's appointment.

28 Issues have been raised about their experience by TRJ.

29 Affidavit of AAM, exh 6-7 (CFI 32). The file is also exh 3.

30 Affidavit of AAM, exh 10, 12 (CFI 32). This file is also exh 2.

[48] Mr Marshall was aware of various legal issues that had surrounded people indicating they wished to make a will and dying before the will was made and as such was concerned to take precautions to try and avoid such a situation arising.

[49] Mr Marshall met with CGB on a number of occasions. CGB was particularly sensitive to PAS hearing the discussions and as such efforts were made to ensure that she was not in the room or close by at the time the conversations were occurring. It is evident from the exchanges between Mr Marshall and CGB that it was difficult to get CGB to commit to instructions.

[50] At the initial meeting between Mr Marshall and CGB they discussed PAS and potential claims she might make against the estate. CGB stated that PAS was not his de facto.[31] CGB's position remained unchanged throughout his meetings with Mr Marshall and indeed with Mr Ross.

[51] At the initial meeting with Mr Marshall CGB also stated that he had a person claiming to be his daughter, but could not remember her name.[32] CGB did at that meeting identify CJW and CAR as his brothers. In relation to CAR he said he had had no contact with him in recent years.[33]

[52] CGB and Mr Marshall discussed the fact that he did not have a will which caused Mr Marshall to be concerned. Notwithstanding that Mr Marshall explained to CGB the effect of having no will and the intestacy rules, CGB indicated that he did not want to rush and gave no will instructions.

[53] In a subsequent conversation of 18 September 2013, CGB told Mr Marshall that he wanted to do a will when Mr Marshall asked what he wanted to do. Mr Marshall said if that was the case he needed instructions. CGB stated he only wanted to deal with him face to face because he did not want anyone to know what was in the will. In this regard he said that there were things he did not want TJR to know.

[54] In a telephone discussion of 24 September 2013 Mr Marshall again sought further instructions for the preparation of the will. That conversation was more extensive. In relation to that he and CGB discussed a testamentary trust, which CGB had mentioned in their first meeting because he "wanted to be like Elvis". Mr Marshall commented "He was very interested in the ability of the company's continuing after he'd gone."[34] However, having discussed it when Mr Marshall then asked if he wanted a testamentary trust he records that "[CGB] was again non-committal about this". In that conversation he again said that PAS was not his de facto, but said he would leave her M Street but no cash or other assets. They discussed the fact that there had been a $400,000 settlement with her previously. Mr Marshall explained to CGB that if she was his de facto or dependant she could make a claim on his estate.

[55] Mr Marshall and CGB also discussed DAJ again. CGB again denied she was his child but said "He has never acknowledged her".[35] Mr Marshall explained to CGB that DAJ may make a claim against his estate. CGB said he did not know whether he wanted to leave anything to her when asked. The conversation then returned to the testamentary trust and rather than focusing on beneficiaries, CGB was more interested in the money going back into the business. In that regard, Mr Marshall noted his impression:

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31 Affidavit of AAM, exh 6, p87 (CFI 32).
32 Affidavit of AAM, exh 6, p87 (CFI 32).
33 Affidavit of AAM, exh 6, p89 (CFI 32).
34 Exhibit 3.
35 In this regard I note the evidence was that he had apparently signed DAJ's birth certificate.

> "[CGB] seemed to be focusing on the continuation of the company as an entity in the future rather than getting any benefit from it. A circular type of entity perpetuating itself."

[56] The comment made by CGB to Mr Marshall was consistent with the picture of CGB that emerges from the evidence. He is a man who when he was a paraplegic took steps to become a self-made man and was very successful in business. He did not however seem to generally form friendships with people around him, but rather developed relationships with people in order to support him staying at home and being able to build his business empire. In that regard, the picture emerges of a man who was very focused on making money and keeping it and who did not have any great concern for any people around him.

[57] In the discussion of 24 September 2013 Mr Marshall told CGB he needed to find a doctor to sign off that he had capacity. At the end of the conversation Mr Marshall's note summarises the position and states that he still did not have enough instructions to make a will.

[58] Mr Marshall had a further conversation on 26 September with CGB trying to work through various issues with respect to CGB's will.[36] Again CGB did not commit to anything but indicated that for a testamentary trust he wanted Red "CGB" Mine and the Burleigh Heads (R Parade) properties to be part of it but not M Creek. Mr Marshall at the end of the conversation in his summary noted that CGB could recall his assets and the size of them, that he has two brothers and PAS is his carer, but was unable to provide specific instructions in a number of respects and was not certain of his wishes.

[59] Mr Marshall met again with CGB face to face on 9 October 2013. PAN was present at that meeting, save for when he took PAS for coffee in order to enable Mr Marshall to get full instructions without CGB being concerned at her presence. In this meeting the document "Will Instructions" was completed and signed by CGB.[37]

[60] The will instruction sheet drafted by Mr Marshall, which has been described by AAM as a "temporary will" provided that:

(a) the executors were to be CJW and PAN;

(b) there was a specific gift of M Street, Broadbeach to PAS;

(c) R Parade and the Red Barry Mine were to be placed in a testamentary trust;

(d) the trustee was to be PAN and his son;

(e) CJW and his descendants were to be beneficiaries of the will;

(f) Kevin Copley was to be the appointor;

(g) he would like his remains to be placed in a crypt; and

(h) the residue of his estate was to be placed in a testamentary trust.

[61] Mr Marshall went through the aspects of a will with CGB while getting instructions, in particular explaining to CGB:

(a) the role of executors;

(b) possible claims by PAS on the estate;

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36 A note of which is in exh 3.

37 Affidavit of AAM, sworn 21 February 2017, exh 1 which subsequently had "revoked" written on it. The file note of the meeting is found in exh 3.

(c) the effect of specifically nominating M St as a bequest to PAS and the fact it could fail as a gift if the property was sold. Notwithstanding that explanation CGB wanted to just refer to M Street and he did not want to give anything more to PAS;

(d) the testamentary trust and how it would operate;

(e) the different alternatives to doing a testamentary trust when CGB identified whether they could do just a simple will;

(f) family provision proceedings and how they would operate; and

(g) the need to address who is going to pay capital gains tax on M Street if PAS was not a resident.

[62] Although there is no note of any specific discussion in relation to the residue estate, Mr Marshall did note in the summary of matters which he went through with CGB after he had taken instructions which included "D - All other assets to be sold, debts paid and then to the Testamentary Trust."

[63] CGB signed the Will Instruction Sheet. Mr Marshall made a note of the various matters at the end of the document which he considered supported the fact that CGB had capacity including consistency of thought in terms of the terms of the will. He also noted PAS had come home, but that had been taken out for coffee by PAN to allow instructions to be finalised.

[64] Mr Marshall kept attempting to assess CGB's capacity throughout their meetings but considered a medical assessment was necessary to determine the issue. It is evident from the exchanges with Mr Marshall that CGB was aware of the nature and extent of his assets and the nature of the exercise he was undertaking, although he had difficulty in identifying beneficiaries.

[65] On 4 November 2013[38] Mr Marshall attended CGB with Tahlia Stewart to go through the will he had prepared. Mr Marshall stated that he tested CGB as to what his instructions were to ensure he had got it right. While CGB told Mr Marshall that he still wanted a will, he said he wanted to give the testamentary trust thing a miss. Mr Marshall reached the view that CGB had not reached the point of deciding where his bounty would go. However upon enquiry by Mr Marshall as to whether he wanted to revoke the instructions, CGB indicated he did not want to revoke the will. He noted CJW had come to see him recently with "Russell" (presumably TJR) recently and he was not so well.

[66] Mr Marshall had a number of subsequent conversations with CGB where CGB's statements indicated a change in attitude in relation to the will and that he was becoming resistant to the notion of a will. On 7 November[39] CGB indicated that he did not think he wanted to go in the direction of the testamentary trust any further after Mr Marshall had explained it by reference to the Will Instructions.

[67] On 21 November CGB told Mr Marshall he had not reached a decision yet in terms of the will but asked why he had sent a registered letter to PAS. Mr Marshall told him that he had not sent such a letter. Mr Marshall had also explained the only letter he had sent was his retainer. CGB indicated that PAS would intercept all of the mail. Mr Marshall explained to CGB that he had no will at that time and the effect of the rules of intestacy in terms of how his estate would be distributed.

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38 A note of the conversation is in exh 3.

39 Exhibit 3.

[68] On 27 November 2013 CGB told Tahlia Stewart who worked with Mr Marshall that he was not happy with something and might just wipe the whole thing and give it to somebody else.[40]

[69] On 29 November 2013, Mr Marshall met with CGB.[41] Ms Stewart attended with him. Both Mr Marshall and Ms Stewart took detailed notes of the meeting. PAS was in the house on that day. A summary of the events that day follows.

[70] Consistent with the exchanges that had occurred over the previous couple of weeks CGB indicated that he did not want to continue with the will instructions he had previously given.

[71] It is evident from Mr Marshall's recollection of the meeting that CGB was agitated and particularly focused on the fact that he had been sent three letters by registered post, which he said had been signed for by DAR.

[72] Mr Marshall's evidence was that he took CGB through a letter of 29 November 2013 which he had prepared in order to inform CGB of the state of play in relation to his will and the status of the will instructions, which he advised CGB could be proven to be his will. CGB stated that he could not recall signing the will instructions. Mr Marshall then showed him the signed document. Mr Marshall explained to CGB that he had given conflicting instructions as to whether the will instructions represented his wishes or not. In particular Mr Marshall explained that if he did not want those instructions to be considered as an informal will, he needed to either revoke the will instructions or sign a new will.

[73] Despite Mr Marshall's repeated assurances that he had not sent letters to PAS or to CGB at his home address, CGB kept raising the issue of the registered post letters with Mr Marshall and asking whether PAS had contacted Mr Marshall.

[74] When the conversation returned to the question of his will instructions, CGB indicated again he did not want them to apply.

[75] Mr Marshall considered that while CGB was angry he was clear he did not want the will instructions to apply. Mr Marshall got up and told him that he was going to put "revoked" across the will instructions. He then did so in front of CGB. Prior to Mr Marshall doing that, Ms Stewart had also asked whether CGB wished to revoke the will instructions and stated that that would be done by writing the word "revoked" across the document. CGB stated that he did. After Mr Marshall had written "revoked", CGB was then asked by Mr Marshall to sign a document confirming that he had revoked the will instructions. He refused to do so. After a further exchange he said "As far as I am concerned they don't apply".

[76] Mr Marshall then explained to CGB that the rules of intestacy would apply until he had a new will. He explained how those rules would work and who would receive his estate. He asked CGB whether he understood that he had no will which CGB responded that he understood.

[77] A discussion then occurred about the possibility of a partial will during which CGB indicated he still did not know what to do with his estate save that PAS could have the house. He was careful to point out that was M Street. CGB did not want to sign an informal will leaving the house to PAS and letting the rest be dealt with on intestacy. He stated that he did not wish to sign anything that day.

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40 Exhibit 3.

41 Affidavit of AAM, exh 6, p 63-72; exh 3.

[78] Ultimately the discussion between CGB and Mr Marshall ended badly in so far as CGB wished Mr Marshall to sign a cheque to pay his account, which Mr Marshall indicated that he did not wish to do because he did not think that appropriate given it was his invoice.

[79] I have set the evidence of Mr Marshall out in some detail given it is the comprehensive evidence of CGB's testamentary intentions and the changes in his expression of those intentions.

[80] Counsel for AAM and CJW both contended considerable weight should be given to the Will Instructions signed by CGB and that his purported revocation of those instructions was not based on those instructions no longer representing his testamentary instructions but his distraction over the correspondence he thought Mr Marshall had sent to his address contrary to his instructions and concerns about PAS knowing what was occurring in relation to his will.

[81] I accept on the basis of Mr Marshall and Ms Stewart's evidence that PAS's presence in the house that day was a source of distraction and irritation for CGB. She had entered the room while being in proximity to the room on three occasions. Mr Marshall had asked her to leave on one of those occasions which she did. She had entered the room subsequently to CGB confirming that he understood he had no will and an argument occurred, and she indicated that she may have to get her own solicitor. She then left the house. CGB had also indicated in the conversation with Mr Marshall that day that PAS had wanted to have a copy of his will. He also told Mr Marshall that she wanted him dead. However, he then stated that she had diabetes and that she had been good to him.

[82] I also accept that he was distracted during the meeting by the issue of correspondence that he had thought Mr Marshall had sent.

[83] Notwithstanding CGB's agitation on 29 November 2013, Mr Marshall stated in evidence that CGB's presentation that day was consistent with which it always was when he took instructions from him, he was always challenging.[42]

[84] In a telephone conversation with TJR on 5 December 2013, TJR told Mr Marshall that CGB had said that Mr Marshall would not write a cheque for him. Mr Marshall had confirmed that because he indicated it was his tax invoice and he did not feel comfortable. TJR in that conversation had also said that CGB had raised with him that Mr Marshall had sent registered letters to him or PAS. Mr Marshall explained he had told CGB he had not sent the letters. Notably both these matters are consistent with issues that CGB had raised with Mr Marshall the previous week and showed CGB did appear to have at least some understanding of what had occurred.

[85] CGB had indicated to TJR that he thought Robbins Watson were acting for PAS and he terminated his instructions with them. He did not tell TJR that he had made a will temporary or otherwise with them.[43]

[86] There is no doubt that CGB expressed to Mr Marshall testamentary wishes about his estate. One can infer that his instructions contained in the will instructions and signed by him on 9 October 2013 represented his wishes at least at that point in time and for some weeks after given that Mr Marshall was instructed to contact the parties who were to be the executors and CGB contacted PAN to see whether he would act as trustee of the testamentary trust. The difficulty is how much weight one attributes to those wishes given the subsequent indications in telephone discussions, as well as the

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42 T1-51/440-44.

43 Affidavit of TJR, exh 6 (CFI 37).

meeting of 29 November 2013, that he did not wish to proceed with those instructions and that he did not know what to do with his estate, save that he was consistent about leaving M St to PAS. In relation to leaving M St to PAS, there is some evidence that a degree of indirect pressure was being exerted by PAS in regard to CGB making his will. This is indicated by the fact CGB did not want PAS to see his will and had said to Mr Marshall that she had wanted a copy of his will. She had indicated in the fight on 29 November 2013 with CGB that she would perhaps go and get her own solicitor. In January 2014 another solicitor, Michael Olsen, approached Mr Marshall saying he was acting for and understood he acted for PAS and her husband, a matter which Mr Marshall denied and indicated he had only acted for CGB. There is also some evidence that CGB felt vulnerable to her given the state of his disability and complained to TJR that she threatened him.[44] Mr Marshall however ensured that PAS was not present when CGB was giving instructions and I find his instructions were freely given.

[87] I find that CGB did intend to revoke his will instructions on 29 November 2013 and understood the effect of not having a will and how it would be distributed upon intestacy. I do not consider as contended by Counsel for the Applicant and CGW that it was an irrational act. Mr Marshall went to great lengths to ensure that CGB did wish to revoke the instructions. CGB's desire to do so was also consistent with his statements in the weeks leading up to that meeting that he wasn't sure he wanted to continue with the instructions. That however does not mean that they should be accorded no weight. They are evidence of CGB's testamentary wishes but the weight to be accorded to them needs to take account of the fact that they were subsequently revoked.

Meetings of CGB with Mr Ross

[88] Mr Ross gave evidence. He was a candid witness who knew CGB well although as he acknowledged his recollection had understandably diminished in some respects in relation to CGB's capacity and was refreshed by reference to his diary notes which were not as comprehensive as those of Mr Marshall.

[89] Mr Ross was contacted by TJR about making a will for CGB on 3 April 2014.

[90] Mr Ross had been CGB's solicitor in the past, although CGB had said to Mr Marshall in 2013 that Mr Ross was no longer his solicitor, when Mr Marshall raised with him why he was not contacting Mr Ross. That said, according to TJR, CGB had a bulk of solicitors and used everyone on the coast just about.[45]

[91] CGB saw Mr Ross in respect of making a will on 16 April 2014. He attended a general practitioner, Dr Mahomed with CGB at CGB's home so CGB could be assessed for capacity. CGB had not seen Dr Mahommed previously and it was arranged by Mr Ross as CGB did not have any usual doctor he saw. TJR was also present at CGB's home. Dr Mahomed stated CGB had normal cognitive function and no mental impairment.[46] Mr Ross supported the findings of capacity. Such an opinion is surprising in light of the report of the neuropsychologist, Dr Till and the later report of Dr King, however this was the first occasion Dr Mahomed had seen CGB and CGB had the benefit of being at home with Mr Ross and TJR being present. This is consistent with TJR's evidence that CGB was better on some days than others.

[92] On 1 May 2014 Mr Ross met with CGB at M Street. TJR and PAN attended to the meeting. No note of that conversation was made.

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44 T1-35. Affidavit of TJR, exh 6 (CFI 37).
45 T2-22/1-2.
46 Affidavit of AAM, exh 12 (CFI 32).

[93] On 2 May 2014 Mr Ross prepared a diary note,[47] in which he wrote down some thoughts that he might give to CGB by way of suggestion in the prosecution of the will. AAM thought the diary note represented a note of meeting with CGB. In his evidence Mr Ross clarified that was not the case. The document was a formulation by Mr Ross of suggestions which he thought would attract CGB.[48] It appears some of those matters had been discussed with CGB on 1 May 2014 given Mr Ross' evidence that he had raised various possibilities with CGB and he had not knocked them out of the ballpark. They discussed the idea of the "Red "CGB" Mine Trust" and Mr Ross suggested to CGB that in making a will that he should look after people around him.[49]

[94] In July 2014 Mr Ross visited CGB following a request being made by PAS saying she and CGB wanted him to go to hospital and see him urgently.[50] CGB told Mr Ross that he did not trust TJR as he had put him in hospital. CGB claimed TJR had got him to sign something without knowing what it was and he wanted to revoke any enduring power of attorney.[51]

[95] PAS again contacted Mr Ross the following day after he had been at the hospital asking him to visit CGB. According to his diary note Mr Ross spoke to Dr Johnathan Chin who indicated that he had received authority from CGB to contact him. Dr Chin said that the enduring power of attorney was TJR and TJR had instigated a DVO in the face of what he perceived to be abuse by PAS. The doctor was unable to state whether CGB had capacity about his medical health matters and indicated he would be filing an application with the Guardianship and Administration Tribunal as an interested party to commence an investigation.[52]

[96] PAS then telephoned Mr Ross again. He told her that given his discussion with Dr Chin and the fact he did not know whether CGB had capacity. He also told her there may be an issue about a DVO which potentially had been instigated by TJR as attorney for CGB against PAS but he did not have any details.[53]

[97] Mr Ross did not consider that when he saw CGB in hospital that he was irrational but rather that he was really angry at TJR for having put him into hospital.[54] However, Mr Ross then noted that he had written a file note which indicated he had been unable to determine whether CGB had capacity from the telephone call because he was rambling.[55]

[98] It is evident from Mr Ross' diary notes in August 2014 that he met with CGB at VS Aged Care Facility including with TJR to discuss his care arrangements and encourage him to finalise his will.

[99] Mr Ross sent letters to CGB at VS on 19 August 2014 and 2 September 2014 indicating the steps to do his will where he stated:

> "The problem we are having is that we have now seen you on at least six occasions in conference and have had numerous phone calls with you, but you still have not given us instructions for your will."

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47 Exhibit 2, p20; T1-79/40-46, T1-80/9-11.
48 T1-80/14-20.
49 Affidavit of AAM, exh 13 (CFI 32).
50 Exhibit 2, p38.
51 T1-75/5-29.
52 Exhibit 2, p36-37.
53 Exhibit 2, p36.
54 T1-75/l19-33.
55 T1-67/l15-30.

He advised CGB as to the effect of his estate passing under the rules of intestacy.[56] He was however unaware of the existence of any children of CGB.

[100] On 9 April 2015 Mr Ross emailed a letter to the Public Trustee in response to a request from them as to CGB's instructions so it could consider bringing an application for a statutory will.[57] The letter stated inter alia:

> "No concluded Will was made for [CGB] though his testamentary intentions as far as the writer was concerned (probably witnessed by [TJR] and/or [PAN]) were as follows:
>
> 1. That the partners for the time being of Collas Moro Ross be appointed executors and with a desire that the writer act initially in its Trusts;
>
> 2. Legacy of about $200,000 to [PAE] ([PAN]'s son) to assist with his tertiary education. [CGB] was clear that he had promised for a long time to fund [PAN]'s son with his education in the hope that he one day become a doctor. This was apparently a longstanding desire for [CGB], he and Noel having been colleagues and friends for over 20 years.
>
> 3. Gift of his house at M Street to [PAS] together with some cash absolutely. This was to keep a roof over her head and to give her a cash shield, she having cared for him for so long.
>
> 4. Of the residue then remaining:
>
> (a) as to one-third to [TJR], [PAN] and [DAR] in appreciation of their help and mateship (subject to anything further to [PAS] as discussed in last paragraph);
>
> (b) the remaining balance of two-thirds to be dropped into the "Red" [CGB] Testamentary Trust for a range of charitable beneficiaries to fund medical care and research into spinal injuries being a trust with general charitable intent."

[101] In evidence, Mr Ross said that the letter overstated the position.[58] He said that the true position was that CGB had not finalised any testamentary intention. That is consistent with the evidence of TJR who did consider that the discussion between Mr Ross and CGB at which he was present was anything more than an introductory conversation, save he does state that CGB had expressed a desire to provide a gift to PAE.

[102] Mr Ross said he had proposed to CGB a logical perhaps equitable formula that he may wish to consider and that some matters had met with CGB's interest but they did not receive instructions to prepare the will.[59] In particular in the letter he stated:

> "We apprehend that [CGB], though successful in business, but not declaring his intentions in the sense of signing a will, he could keep everyone on their toes and 'hold court' as he usually did. By not doing a will, [CGB] probably believed he was less vulnerable to people abandoning him."

[103] Mr Ross agreed in evidence that CGB was in effect treating Mr Ross in the same way and teasing him.[60]

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56 Exhibit 2, p48.
57 Exhibit 2, p108-110 and 106.
58 T1-77/31-34.
59 T1-77/36-47.
60 T1-87/21-29.

[104] The letter contained a further proposal in relation to PAS. Mr Ross stated that the proposal with respect to PAS was to encourage CGB in his will to rewarding her for a longer life at home, so CGB would not feel as vulnerable if he made a will by giving PAS an incentive to stay.[61]

[105] It was evident from Mr Ross's evidence that Mr Ross had floated a number of ideas, which he considered CGB had some interest in, particularly because he had not hit them out of the ballpark, but never gave Mr Ross instructions to proceed to make a will in the terms of the suggestions that apparently caught his interest. In particular according to Mr Ross the suggestion of making a donation to the Spinal Unit at the Princess Alexandra Hospital where CGB had gone for treatment when he became a quadriplegic had met with some interest and some attraction, but that was the highest he could say the conversation went.[62]

[106] CGB made no mention of the fact that he had children in his discussions with Mr Ross. Mr Ross said had he known that he had children he would have advised him to include them in his will and encouraged him to be generous.[63]

[107] In terms of PAS, it was Mr Ross who suggested that she be given a bequest which provided her with the gift of the house with some cash to keep a roof over her head and give her a cash shield which is what he described as "the three": "A roof over your head, security and income stream".[64] Mr Ross had given CGB prompting in this regard and he encouraged CGB because he was "the longest living quad". He indicated that his suggestion did not meet a "knockout blow".[65] However in a conversation with AAM, AAM recorded that Mr Ross indicated CGB was shocked at the suggestion made to him by Mr Ross that PAS should get the house and some money. Mr Ross did not give any evidence that he was aware of the Family Court settlement reached between CGB and PAS in 2009. The documents in relation to that show a different firm was acting.[66]

[108] Mr Ross' evidence was that he had been trying to encourage CGB to make a will for years. He explained in relation to a diary note of 26 May 2014,[67] that he had a conversation with Mr Radcliff where Mr Radcliff was enquiring whether he was preparing a will for CGB to which he had stated that he could not respond because of professional privilege. Mr Radcliff told him that Evan Cooper had been trying to get CGB to do a will for two years to which Mr Ross responded "I've been trying for 15 years."[68] Mr Ross indicated that he had raised with CGB a number of times over 15 years the prospect of him doing a will.[69]

[109] Mr Ross also gave evidence that he was not surprised when he was told that CGB had been seeing another solicitor about preparing a will. He said "Hardly surprising. He was playing the field all the time. I am sure he was teasing me. I am sure he was teasing others. Other solicitors that is."[70]

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61 Exhibit 2, p108
62 T1-81/10-19.
63 T1-82/5-14.
64 T1-83/1-16.
65 T1-84/8-11.
66 Affidavit of MAA filed 23 February 2017 exh MAA5-MAA14.
67 Exhibit 2, p24.
68 T1-88/1-22.
69 T1-90/40-47.
70 T1-91/11-12.

[110] Mr Ross also gave evidence that he had explained the effect of intestacy to CGB a number of times over the years.

[111] No evidence was called from Mr Cooper, notwithstanding Mr Radcliff was appearing on behalf of TJR and was instructed by Mr Cooper's firm. As such I did not consider that he could assist any further in terms of providing any detail as to CGB's wishes.

TJR

[112] AAM also relied on testamentary wishes expressed by CGB to TJR and statements made to DAR by CGB in formulating the proposed will.

[113] TJR has had a long relationship with CGB which evidently has transcended that of accountant and business advisor to a friendship. I note he appears to be a constant visitor of CGB at VS Aged Care Facility and indeed organised an 81st birthday party for him at the home not long after he was admitted.[71]

[114] According to TJR's first affidavit, CGB spoke of the possibility of providing a benefit to Mr Copley, his former solicitor and PAN both who appeared to help him get finance when he could not get anyone to do so.[72]

[115] In his second affidavit, TJR stated that he did not regard CGB as having expressed his testamentary wishes to him. He considered that AAM had misunderstood the statements in his affidavit. He stated that CGB's attitude was that he did not want a will as it was preparatory to death and that he had fear of PAS if she found out he had a will.[73]

[116] TJR states in his second affidavit that, CGB during the whole time he knew him showed no interest in having a will, other than when he took advice from Robbins Watson and Collas Moro Ross. He expressed an opinion that CGB may have chosen not to have a will despite having received advice.[74]

[117] TJR also gave evidence that:[75]

(a) CGB did not want to have a will as he considered that making a will was an act preparatory to death;

(b) that he had not been told by CGB that he was instructing Mr Marshall to make a will;

(c) that CGB had a genuine fear for his life if PAS found out he had a will on the basis of what CGB had told TJR on a number of occasions;

(d) that the document referred to as the "Temporary Will" was not in CGB's papers which TJR had custody of and that CGB had told him that he never made a will with Robbins Watson;

(e) that CGB had not given Mr Ross any instructions in any definitive manner concerning the preparation of a will in the meetings he attended with CGB and Mr Ross; and

(f) he does not think CGB would have understood what an appointor of a trust was even if it was explained to him.

Evidence of cognitive decline

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71 Exhibit 2, p51.
72 Affidavit of TJR, [59] (CFI 2).
73 Affidavit of TJR, [3] and [4] (CFI 37).
74 Affidavit of TJR, [85] and [88] (CFI 37).
75 Affidavit of TJR, (CFI 37).

[118] In assessing the evidence as to CGB's wishes, regard must be had to any issues of his capacity. Wishes expressed by someone without capacity should be accorded less weight.[76] The same is true if there is a decline in capacity.

[119] According to TJR, CGB started showing some signs of cognitive decline in 2012.[77]

[120] CGB was admitted to hospital on 18 July 2013. He was subsequently referred to a neuropsychologist, Dr Hayden Till, for a neuropsychological assessment of CGB's decision-making capacity for personal and financial matters. The report of 21 August 2013 notes as background to the referral that TJR had said that CGB had experienced a decline in cognition, paranoia and confusion over the past twelve months. In his report,[78] Dr Till stated that he found CGB to be a very difficult historian due to his highly tangential responses to questions. He was able to give some details of a loan and expressed concerns that it had been to a barrister who had acted for him.[79]

[121] Dr Till found it impossible to garner any reasoned answers to questions from CGB. He considered that his thought content was clearly limited to specific topics. According to Dr Till, CGB was not prepared to engage in formal tasks such that the assessment of cognitive function could not be completed. He found CGB was very difficult to fully engage in the assessment process. Dr Till was not able to comment on CGB's current cognitive profile nor his intellectual strengths or weaknesses. He opined that clinical and capacity interviews appeared to indicate he had difficulty in remaining in contact with a topic of conversation and engaging in cohesive thought processes necessary to make an informed decision. The report concluded that it was unclear whether CGB had the wherewithal to make well-informed decisions about the matters of concern. He considered it may be in his best interests if guidance and determination was sought from QCAT.

[122] CGB was subsequently admitted to hospital and a further report was done by Dr Till on 16 January 2014.[80] The neuropsychological report was in relation to an assessment of CGB's decision-making capacity but not in relation to his financial and testamentary capacities. At that time CGB stated he wanted to return home and that PAS could care for him but he could not explain how she could do so over 24 hours each day. Dr Till considered he appeared to be unable to comprehend his level of care needs and how they may best be delivered. Dr Till considered that CGB had an inability to engage in a cohesive and consistent thought process. He concluded that CGB appeared to currently lack the capacity to make well-informed decisions with regard to the two matters which were assessed, namely his current home arrangement and health care matters.

[123] TJR engaged Dr Penelope King, a psychiatrist, to assess CGB on 24 September 2014. He considered CGB had got to the stage where he ceased to be his own man approximately three to four months before that time.[81] CGB indicated to Dr King that he did not have a will that he was aware of but he may have part of one but was unable to explain what he meant.[82] He thought his assets were in the realm of $50,000,000. According to Dr King:[83]

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76 *VMH v SEL* [2016] QSC 148.
77 T2-84.
78 Affidavit of AAM, exh 8, p160 (CFI 32).
79 Which TJR confirmed in evidence was correct save that he said it was repaid together with interest.
80 Affidavit of AAM, exh 9 (CFI 32).
81 T2-20/25-47.
82 Affidavit of TJR (CFI 2).
83 See CFI 2.

> "At the time of interview he was disinhibited and disorganised. There was evidence of cognitive impairments on the background of progressive decline noted. I suspect he has an early dementia impacting on his frontal lobe functioning and likely to be secondary to repeated physical illness and cerebrovascular insult. … It is likely his cognitive problems will progress. … 'I do believe his ability to understand the nature of a power of attorney and what is detailed was limited' … He has many interested parties and he presents as vulnerable to suggestions. … I do not believe that he has capacity in all domains and decision making for complex matters. Specifically I do not believe that he has the ability to make a decision regarding powers of attorney, either to appoint or revoke."

[124] TJR stated that he had noticed a decline in CGB's cognitive functions from about September 2012 which were episodic insofar as some days were fine and other days were not.[84] CGB exhibited some signs of being paranoid.[85] The decline has been gradual. He said CGB's behaviour had always been erratic and it was difficult to tell whether his behaviour was his age or his normal behaviour.[86] By 2013 he was concerned about CGB's capacity.

[125] Mr Marshall and Mr Ross both stated that they were not told of the reports by Dr Till, although CGB told Mr Marshall he had some sort of assessment.[87]

> Evidence available to the applicant or that can be discovered with reasonable diligence of the circumstances for a person for whom provision might reasonably be expected to be made by a will by the person in relation to whom the order is sought

[126] In relation to this AAM provides evidence as to the following people:

(a) PAS;

(b) CJW;

(c) DAR;

(d) TJR;

(e) PAN;

(f) PAE;

(g) Mr Kevin Copley;

(h) DAJ; and

(i) OAM.

[127] As set out above evidence has also been provided directly by a number of the above parties a summary of which I also set out below.

PAS

[128] According to the affidavit of PAS,[88] she and CGB had entered into a relationship which included intimacy in 1993. She states that she carried out all household tasks providing health care and personal care and apparently arranging for aspects of his business to be dealt with and paying the household bills.

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84 T2-16/36-45.
85 T2-17/1-2.
86 T2-17/46-47.
87 T1-58; T1-89.
88 Affidavit of PAS (CFI 33).

[129] PAS states that she started proceedings in the Family Court in 2009 claiming she was a de facto because she needed funds to buy necessities in the home such as a better bed and a new television. She signed an agreement providing for $400,000 to be paid to her and signed settlement documents stating that she and CGB were not in a de facto relationship. According to her, she signed the settlement documents because of duress and control exerted by CGB and the pressure of a solicitor to whom she owed fees. She stated she was not fully advised by her solicitor as to the effect of the agreement.

[130] PAS claims that after the court order CGB insisted she continue to live with him at M St and states that they entered "another de facto relationship". However it appears it was always contemplated that PAS would return to live with CGB. The terms of the Minutes of Consent[89] which was a document forming part of the settlement reached in 2009 of the Family Court proceedings brought by PAS expressly provided that, inter alia:

> "The Applicant and the Respondent acknowledge that:
>
> ….
>
> (2) the Applicant and Respondent are not, and have never been in a de facto relationship…
>
> (3) the Applicant and the Respondent's relationship is limited to one whereby the Applicant, in the past, has provided the necessary everyday care to the Respondent, as outlined in the Deed of Settlement and Release;
>
> (4) the Applicant and the Respondent intend that in the future, the Applicant will be at liberty to remain living at the Respondent's residence on the basis that the Applicant continues to provide the necessary everyday care to the Respondent at that residence;
>
> (5) the Applicant acknowledges she has no claim upon the Estate of the Respondent and the Applicant will execute the Deed of Release, Disclaimer and Indemnity, excepting an entitlement willed, bequeathed, gifted or devised to her by the Respondent…"

[131] In July 2016, PAS evidence is that she instituted another application to revisit the order of 2009 and sought a declaration for a de facto relationship post proceedings from 2009. She is now currently seeking to have the order of 20 October 2009 set aside. Such proceedings may be continued after CGB's death.

[132] Despite having being banned from seeing CGB she claims that CGB has reached out to her in a number of phone conversations asking that she visit him and, inter alia, take him home.

[133] She asserts that she and CGB love each other and he had always assured her that he would provide for her in his will when he was gone. That is contrary to what is reflected in the Minutes of Consent referred to above.

[134] She rejects TJR's assertions that she was paid $1,200 per week saying it was mostly for household expenses and that whatever was left she used for recreational use such as playing the occasional pokies. She refutes that the $60,000 per year in cash cheques provided any benefit to her and asserts that was the way that CGB had paid for services. She rejects the suggestion by TJR that she received any benefit from cash cheques estimated to be in excess of $250,000.

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89 Affidavit of PAS, exh 14, p 192 (CFI 33).

[135] She claims to be entitled to bequests under CGB's will, given the care she gave to him throughout his life including when he built up his business and rejects the allegations made by TJR and DAR. She has not spoken to CGB since September 2016 as a result of orders being made by QCAT.

[136] In this regard in a decision of 4 January 2016 QCAT considered that the view expressed by CGB that he did not want to see PAS until he was better accurately reflected CGB's wishes despite his dementia.[90] The decision maker also found that despite PAS's claims that she loved CGB, and she was acting in his interests, that she was "unable to separate her own interest from [CGB]'s interest."[91] The Tribunal refers to evidence of PAS isolating [CGB] at the nursing home, upsetting him in visits and interfering with his care, as well as constantly ringing him. The Tribunal member concluded that he was satisfied "On the evidence that [PAS]'s current relationship with CGB is not supportive, but rather motivated by [PAS]'s emotional and/or financial self-interest."

[137] According to TJR,[92] PAS had no other role other than being a formal paid house help. His evidence is that there was no relationship between PAS and CGB. He states that he made an application for a DVO after CGB had told him PAS had assaulted him regularly. He stated that in the months prior to July 2014 she had also tried to take over the running of CGB's businesses but that came to a stop because of CGB's appointment of Mario Agius as his general manager.

[138] TJR states that he was in control of CGB's accounting, and he noted that from 2010 onwards the cash cheques totalling $60,000 were negotiated in each year. That sum equated roughly to be $1,200 per week which was the sum given to PAS by CGB. He however noted that during the period of 1 July 2010 and 30 June 2011 cash withdrawals amounted to $202,355 and there was no explanation as to why that would be the case. There is no evidence he asked CGB why there was such an increase in the withdrawals.

[139] TJR also noted that after CGB had left VS Aged Care Facility there were a number of valuations found on pieces of jewellery when clearing out the house. In this regard PAS asserts that she has spent part of the $400,000 paid to her in settlement of jewellery. Her counsel in submission stated it was unsurprising that PAS was given jewellery over 20 years by her partner. TJR's counsel pointed out the valuations were generally for jewellery obtained in 2010-2011 in the amount of approximately $343,000.

[140] TJR also states that PAS gave CGB a letter from her lawyers seeking monies by way of property settlement after the M Street property was sold while he was in hospital.[93] According to TJR, CGB stated to TJR that there was no relationship, and she was not getting any money as she was not his wife. TJR in evidence also indicated that PAS had attempted to come to the hospital with a marriage celebrant which was rejected by CGB.

[141] Mr Ross made the observation that the relationship between CGB and PAS was symbiotic and she had assisted CGB to continue to live at home through her care. He observed that they fought like cats and dogs. Mr Ross did not appear to have had as much contact with CGB as TJR, particularly in recent years.

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90 *CGB* [2016] QCAT 9, [69]; Affidavit of AAM, exh 15 (CFI 32).

91 *CGB* [2016] QCAT 9, [72].

92 Affidavit of TJR, [19]-[39] (CFI 37).

93 Affidavit of TJR, exh 3 (CFI 2).

[142] CGB informed Mr Marshall that he and PAS did not have a physical relationship and were not de factos. He acknowledged she had cared for him for many years.

[143] Mr Ross, Mr Marshall and TJR all gave evidence that CGB did not want PAS to have anything to do with his business and nothing to do with his will. This was a particular source of angst to CGB in his dealings with Mr Marshall.

[144] According to DAR, PAS did not always give assistance to CGB. PAS denies this.

[145] While PAS gives evidence supportive of her contention she and CGB were in a de facto relationship, none of the evidence from TJR, Bill Ross or DAR is supportive of the relationship between CGB and PAS being anything more than that of a live-in carer. She was not cross-examined and it is not necessary for the purposes of this application that I make a finding as to whether she and CGB were in a de facto relationship.

[146] There is no evidence that in his discussions with Mr Marshall or Mr Ross that CGB ever accepted that PAS was his de facto or that he had any testamentary wish that she be treated in that way.

[147] PAS's evidence is that she is presently living on the pension, has no property and is boarding at a friend's place.

[148] Submissions have been raised about conduct which may constitute disentitling conduct in respect of PAS which I consider below.[94]

DAR

[149] DAR is suffering from dementia and is 75 years of age. He worked for CGB for approximately 14 years. He was paid approximately $500 per week cash in hand for the services he rendered to CGB in the mornings and afternoon according to TJR. He has recently broken his pelvis and has also suffered from various other medical problems, some of which are attributed by him to working with CGB and which resulted in surgery. Other possible causes for such injuries are raised by PAS and TJR.

[150] DAR provided an affidavit indicating that CGB had promised him that he would be taken care of in his will. DAR was originally employed by CGB to work at the quarry. Subsequently he worked for CGB getting him in and out of bed for approximately 14 years. According to the evidence of TJR and PAS, that work involved two hours of work in the morning and again in the evening. According to DAR, CGB promised to "look after him" after he had gone and said he would leave him part of his estate. According to DAR's affidavit he had been promised 25 per cent of his estate by CGB when he died. He indicated that he has suffered medical problems as a result of lifting CGB.

[151] His daughter, who is his litigation guardian, indicated that she had noted her father's mental capacity had declined particularly since his visit to hospital since October 2016 and on 19 December 2016 he was assessed as having impaired decision making capacity. DAR's original affidavit was sworn on 25 November 2016.[95] As such it must be treated with a degree of circumspection.

[152] The evidence supports the fact that DAR would call to CGB's home each morning and each night in order to get CGB out of bed, bathed and mobile and put him into bed in the evening, but not that he worked an 8-10 hour day. He states he was originally paid

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94 Jackson J in *VHM v SEL* at [126], [137], [145] and [168-9] discounted the wishes of the proposed testator because events have occurred which indicate the person would have changed the will had they had the capacity to do so.

95 Affidavit of DAR (CFI 23).

$200/week which increased to $500/week. TJR confirms his understanding that DAR was paid $500/week. PAS however asserts it was $600 per week.

[153] According to TJR, CGB said he paid DAR cash to keep him "under the radar" for pension purposes.[96]

[154] TJR considers that if CGB made promises to DAR, CGB's promises were just to get DAR to do as he wanted describing him as "a loveable rogue who would use every trick he could to endear a person to provide him with assistance".[97]

DAJ

[155] DAJ is CGB's daughter which has been confirmed by DNA tests. She had not had a relationship with her father and made contact with him in 2013. Insofar as she attempted to build a relationship with him that was unsuccessful. She indicates that she is a single mother with three children. In 2015 she studied to become an equine nurse but presently is still looking for work and receives Centrelink payments. She lives in rented accommodation. She met her father on three occasions in 2013. Her father did not seem receptive to developing any relationship with her.

OAM

[156] OAM provided an affidavit which indicated that he had not had any relationship with his father and contacted his father following receipt of a letter from his mother. He sets out various matters demonstrating that he had had a difficult childhood and upbringing. He indicated that he did not try to contact his father after being told by DAJ that she had located him because she had described him as an alcoholic and in a wheelchair and he did not want to be put back into a life which he had tried to escape from. He moved to the United States and received a letter from his mother in 2016 telling him that CGB was his father and that he should get in contact with him. He travelled to see his father but apparently CGB did not appreciate who he was and spoke about his business interests. He had a DNA test carried out to confirm whether CGB was his father and at TJR's instigation retained a lawyer.

[157] According to OAM he has struggled for many years financially and has two children and they do not own any investment properties and have approximately $80,000 in credit card debts. He lives in rented accommodation.

[158] In terms of the proposed will he indicates that he did not see any evidence his father had any relationships other than a close and abiding friendship with TJR.

CJW

[159] CJW, CGB's brother also filed an affidavit. His evidence is that he and CGB had grown up together. CGB moved away when he was approximately 16 years of age. They however maintained contact. CJW states that CGB had told him when he was 34 years of age that a woman had told him that she was pregnant and that CGB was the father. CGB told CJW that he was leaving Victoria and was not ready to be a father. He moved to the Gold Coast. He visited CGB at the Gold Coast after he had been injured and at that stage could walk with the assistance of an aide. In the 1980's CGB had contacted him and asked him to organise repairs for a piece of machinery that he had been working on at the quarry in Townsville. CGB did not reimburse CJW for the repairs.

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96 Affidavit of TJR, [60] (CFI 37).

97 Affidavit of TJR, [63] (CFI 37).

[160] CJW states that TJR contacted CJW on a number of occasions to see how he was and discussed how CGB was doing. In 2014 TJR had become aware that CJW and his wife were struggling as their car had broken down, so he organised the purchase of a new car paid for by CGB. CJW flew down to see CGB after CGB had a bad infection, with the airfares and accommodation being organised by TJR. He indicated that on one of his three visits to see CGB, CGB had stated that he wanted CJW to be the executor of his will to which he agreed. Mr Marshall records that CGB had told him that he had a visit from CJW and that he was not so good. In that same meeting he indicated that he did not want to pursue the testamentary trust although he did not revoke his instructions.

[161] CJW's health is currently in decline. CJW has had health difficulties since 2015. He had received a phone call from CGB while he was in Oz Care Port Douglas but indicated that he did not think CGB had any concept of reality and it seemed as though CGB thought both he and CJW were much younger and healthier than they were in reality. He has had no contact with CGB since the end of 2016. He and his wife are supported by the pension and living in an RSL Nursing home. They have some cash in the bank.

[162] TJR in cross-examination agreed that the description of the relationship that he had with CJW as described in TJR's first affidavit[98] was accurate. However that report states that CGB has nephews that he remains in contact with, and in particular he is close to his brother CJW with whom he worked as a younger man. He left home at 15 years of age.[99] It is unclear whether TJR agreed with the whole description or just with that of the relationship between CGB and CJW. TJR in his affidavit of 15 February 2017 stated that CGB has not met any of CJW's children and probably does not even know of their existence. He was not directed to the paragraph of his affidavit nor asked to clarify it. CJW identified only one occasion when he invited CGB with his children to visit him, which was in 1978 with his three daughters. CJW only has one son from his first marriage who CJW has not seen since he was 25 years of age. He has two step daughters from his most recent marriage.

[163] I accept that CGB and CJW did maintain a relationship as brothers and CJW appears to be the only member of CGB's family with whom he did maintain a relationship.

[164] CJW is CGB's brother. He is in his 80's in an RSL nursing home, has poor health and few assets.

TJR

[165] I have set out a summary of TJR's evidence above.

[166] TJR has been CGB's financial advisor and accountant for many years. He appears to be the one who has had constant involvement in CGB's life in recent years both before and after he was admitted to the nursing home. He gives evidence that he visits CGB on an almost daily basis except for weekends. The evidence shows there was a period in 2013 when CGB was distrustful of TJR. That appears to relate to TJR's actions in putting him in hospital and his involvement in a loan from CGB to his former barrister. No evidence of the actual circumstances are known. It appears that he began to have significant involvement with CGB again in 2014.

Evidence as to other persons

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98 See p 136 (CFI2).

99 T2-21/8-15.

[167] PAN was involved in a company known as BC who advanced funds to CGB when apparently no one else would do so. He has seen CGB from time to time and appeared to be involved in some of the meetings with respect to his will in 2013 and 2014. In recent times he has not visited CGB at the nursing home. He has not appeared in these proceedings.

[168] PAE is PAN's son. It appears he had no specific relationship with CGB and CGB was aware of him through his relationship with PAN. He has not appeared in these proceedings.

[169] Mr Kevin Copley was CGB's first solicitor and referred CGB subsequently to Bill Ross when he retired. Apparently Mr Copley also helped CGB obtain finance when he was wheelchair bound and could not obtain finance from other sources. He has not appeared in these proceedings.

[170] Mr Ross gave evidence that TJR, PAN and Kevin Copley had all assisted CGB particularly in establishing his business.

> Evidence available to the applicant or that can be discovered with reasonable diligence of any persons who might be entitled to claim on intestacy

[171] Presently CGB's two biological children would take the entirety of the estate on intestacy. PAS's application to the Family Court to be recognised as CGB's de facto may affect that position.

> Evidence available to the applicant of the terms of any will previously made by a person

[172] Evidence has been referred to above about the "temporary" will made by CGB which subsequently had the words "revoked" written on it during the course of a meeting between Mr Marshall and CGB on 29 November 2013. Its status is contentious between the parties.

[173] There is no evidence of any will. Given CGB's attitude to making a will I accept that none exists.

> Evidence available to the applicant of the likelihood of an application being made under s 41 in relation to the person

[174] AAM identifies three parties who may bring family provision applications. Given that DAJ and OAM are CGB's biological children they would be eligible to bring a family provision claim against his estate pursuant to Pt 4 of the *Succession Act*. AAM was not able to speculate on the extent of such a claim.

[175] According to the submissions of DAJ, she and OAM are in necessitous circumstances and would have significant claims on a Family Provision Application.

[176] It was not submitted by any party that the court could on the evidence make a determination of the amount any entitlement of DAJ and OAM may be if successful in a Family Provision Application under s 41. The evidence is insufficient to make such an assessment, which in any event is made at a different point in time.

[177] There is clearly a likelihood that such applications will be made by DAJ and OAM. I am satisfied that they have some prospect of establishing such a claim.

[178] AAM also refers to the fact that if PAS could establish that she is CGB's de facto, she could bring an application for further provision under Pt 4 of the *Succession Act*. She notes that her eligibility to bring such a claim would be an issue likely disputed by any executor or administrator of CGB's estate. I note in that regard that the settlement deed

signed by PAS excluded the possibility of making a claim against CGB's estate as well as declaring that there was no de facto relationship in 2009.

Evidence of any charities

[179] The evidence of Mr Marshall indicates that CGB was not receptive to giving any money to charity. Mr Ross raised with CGB the possibility of donating money to charity. Mr Ross had raised the fact that CGB had been in the Spinal Unit at the Princess Alexandra Hospital. He suggested that there may be a potential charity that he would like to leave money to. CGB did not agree but nor did he completely disagree.[100]

[180] AAM deposes that given CGB had been a quadriplegic for over 40 years it is to be expected that he may want to support a charity or charities to provide medical support and research to those who suffer spinal injuries.

[181] On the basis of the oral evidence of Mr Ross, I think that at its highest CGB had shown some interest in the idea. The charity referred to in the proposed will is the Spinal Research Institute which focuses on research in the area of improving care and treatment for spinal injuries and the secondary consequences of those injuries.

[182] While it may be a logical charity for CGB to donate to if he chose to do so there is no evidence supporting any history of CGB donating or being willing to donate to charities.

[183] Mr Ross in a conversation with AAM stated that his view was that the lion's share of CGB's Estate would go to charity because "no one was getting his dough".

Requirements of s 24

[184] The court must be satisfied of the five conditions in s 24 before it can grant leave. I have set out a summary of the evidence in quite a bit of detail given the evaluative nature of the court's role. I have reviewed all of the evidence even if it is not specifically referred to above.

[185] All parties agreed that the matters in s 24(a), (b) and (c) were established on the evidence. I found that they are satisfied and set out the reasons briefly below.

Is the applicant for leave an appropriate person to make the application?

[186] AAM was appointed by the court as litigation guardian of CGB. CGB joined as a respondent in the proceedings and AAM was substituted as the applicant in these proceedings by an order made by Mullins J on 15 December 2016. No party disputed that she was an appropriate person to make an application. TJR's counsel raised the fact that AAM has no personal knowledge of CGB but didn't contend that AAM was not an appropriate person. While AAM has no personal knowledge, given her appointment as litigation guardian and her independence, she does qualify as an appropriate person to make the application.

[187] TJR who had originally brought the application as administrator considered he could not continue with such an application due to a potential conflict in his position. The Public Trustee who also administers CGB's financial affairs, while it raised the possibility of making an application in 2015, did not make such an application nor did it seek to be joined in the present application.

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100 T1-81/1-19.

[188] I consider it is appropriate for AAM to make the application.[101] In terms of her evidence however as to CGB's wishes and the position of the other parties, I note that it is based on her evidence gathering exercise and is hearsay and opinion rather than her having any personal knowledge of those various matters. That accordingly affects the weight which can be attributed to some of the opinions which she offers notwithstanding her considerable expertise in the area.

> Have adequate steps been taken to allow representation of all persons with a proper interest in the application, including persons who have reason to expect a gift or benefit from the estate of the person in relation to whom an order under s 21 is sought?

[189] I am satisfied that all relevant persons with a proper interest in the application have been identified by AAM and have been served. I note that the Spinal Research Institute has also been served.[102]

> Are there reasonable grounds to believing that the person does not have testamentary capacity?

[190] None of the parties who appeared before me contended that CGB has capacity.

[191] The requirements of testamentary capacity are well established and were set out by Cockburn CJ in *Banks v Goodfellow*[103] as follows:

> "It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

[192] Dr Penelope King who saw CGB in 2014 provided a report dated 12 January 2017.[104] For the purposes of preparing the report she saw CGB on two occasions. Dr King's opinion is that:

> "It is probable that [CGB] has a dementia syndrome of multifactorial aetiology that has progressed between my appointments for assessments of his mental state.
>
> I do not think that his impaired mental state is reversible. He has a baseline of moderate cognitive impairment that at times is severe. It is associated with misidentification and misinterpretation.
>
> He struggled with recall of his assets and particular, in comparison to his assessment in 2014. He is impaired in describing what a will is in terms of detail and purpose.
>
> It is my opinion [CGB] does not have testamentary capacity and that he his moderately impaired in his cognition that renders him vulnerable in all modes

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101 Which also appears to have been the view of Mullins J in *Deecke v Deecke* [2009] QSC 65 at [33].

102 Affidavit of Service of AAM (CFI 45).

103 (1870) LR 5 QB 594 at 565. This has been followed on numerous occasions and recently explained in a more modern context by Applegarth J in *Frizzo v Frizzo* [2011] QCA 308 at [24] where it was not questioned in the Court of Appeal.

104 Affidavit of AAM, exh 5 (CFI 32).

> of decision making. There is no suggestion on repeat interview that this is reversible and therefore his opportunity to improve in the future is highly unlikely."

[193] The conclusions of Dr King are consistent with the evidence of decline in CGB's capacity, evidenced by the reports of Dr Till and earlier reports of Dr King as well as the observations by TJR.

[194] I note the report of Dr Mahommed which was supported by the observations of Mr Ross considered that in May 2014 CGB had no cognitive impairment. Mr Ross did however note questions of capacity were raised by Dr Chin and himself when CGB was admitted to hospital in July 2014. However those findings are not consistent with the reports of Dr Till or Dr King's September 2014 report. The question I have to determine is whether CGB has a lack of capacity now. Given Dr King's expertise as a geriatrician and that she has seen CGB on two previous occasions I am satisfied there are reasonable grounds to believing that CGB does not have testamentary capacity.

[195] I accept that the prospect that CGB will regain testamentary capacity, is, on the basis of Dr King's report particularly set out above, "highly unlikely".

> The proposed will is or may be a will that CGB would make if he had testamentary capacity?

[196] Section 24(d) requires the court to be satisfied, before the grant of leave, that the proposed will "is or may be a will" that "a person would make if the person were to have testamentary capacity". The use of the word "may" suggests a lower evidential base to satisfy the test than other states such as NSW where the court must be satisfied of "reasonable likelihood".[105]

[197] In determining whether to make orders in relation to a statutory will, the Act provides that the court must engage in a fact finding exercise and evaluative process drawing on objective facts in relation to that person's life as well as evidence of their wishes which could indicate that the proposed will is or may be one which that person "would have made".

[198] The use of the word "may" speaks in the present tense.[106] In the sense used in the present legislation it is expressing possibility.[107] The court's role is not however to engage in an exercise of speculation. There must be an evidential basis for determining the will is one the testator is or may have made if the testator had capacity. It is not a case of determining what the testator should do.

[199] Different approaches have been adopted in determining whether a proposed will is or may be a will that the person would make if they had testamentary capacity. Daubney J in *Re Keane: Mace v Malone*[108] adopted a similar approach which had been used by Megarry V-C in *Re: D(J)*[109] in the context of UK legislation. That approach involves a five step process, namely:

> (a) it is to be assumed that the patient is having a brief lucid interval at the time when the will is made;

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105 *Succession Act* 2006 (Qld), s 22(1).

106 The wording of legislation originally proposed used the term 'might' referring to the past tense: p 52 *The Law of Wills* Queensland Law Reform Commission.

107 Oxford English Dictionary, Online Edition (2017), Oxford University Press.

108 (2012) 1 Qd R 319 at [56] – [57].

109 [1982] Ch 237, p 244.

(b) during this assumed lucid interval the patient has a full knowledge of the past, and full realisation that as soon as the will is executed he or she will relapse into the actual mental state that previously existed, with the prognosis as it actually is;

(c) it is the actual patient that has to be considered and not a hypothetical patient;

(d) during the hypothetical interval, the patient is to be envisaged as being advised by competent solicitors; and

(e) in all the normal cases, the patient is to be envisaged as taking a broad brush to the claims upon its bounty rather than an accountant's pen.

[200] In *Re: D(J)* Megarry V-C was concerned with legislation which called for the court to determine what "the patient might be expected to provide if he were not mentally disordered". While that legislation bears some similarities to the Act, the notion of expectation introduced by that legislation, arguably provides for a more hypothetical exercise than the Queensland legislation to be adopted. The approach of the courts in the United Kingdom has been subject to criticism in Australia which was a matter noted by Daubney J in *Re Keane*. Palmer J in *Re: Fenwick*[110] at [108] commented that:

> "It will be seen that, in its 80 year evolution from s 171(1) of the *Law of Property Act* 1925 (UK), the law in the United Kingdom relating to statutory wills has travelled a full circle. After a shaky start in *Re Freeman*, the objective approach was established in *Re Greene*. Some 50 years later, *Re D(J)* re-established the highly artificial 'substituted judgment' approach of the old lunacy cases. By 2005, courts, while paying lip service to the 'substituted judgment' approach, were taking the realistic and pragmatic approach that whether a statutory will should be ordered was to be determined having regard to the best interests of the patient, ascertained objectively, and to the wishes of the patient, if known. That approach is now enshrined in legislation."

[201] According to Dal Pont the condition in s 24(d) of the Act and similar legislation has presented the greatest difficulty to the courts. As recognised by the learned authors "It is not assisted by varying statutory language, which does not differentiate between what has been termed the "nil capacity" cases and "lost capacity" cases."[111] The approach of the courts in Queensland to the application of the test have still not achieved uniformity in the approach to determining whether the test in s 24(d) of the Act is satisfied although the weight of the decisions presently favour "simply" applying the words of the legislation.[112]

[202] Palmer J in *Re: Fenwick* sought to identify the different approaches that should be adopted in the three categories of cases which could be the subject of an application for a statutory will in determining whether the proposed will is or is reasonably likely to be one that would have been made by the person if he or she had testamentary capacity.

[203] Thus in relation to a lost capacity case in which an incapacitated person has never made a will his Honour considered the approach of the court to be:

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110 (2009) 76 NSWLR 22.

111 G E Dal Pont and K F Mackie "*Law of Succession*" Lexis Nexis Butterworths, 2013, p80.

112 *McKay v McKay* (2011) 4 ASTLR 249; [2011] QSC 230 [79]; *Re Matsis: Charalambous v Charalambous* 8 (2012) ASTLR 361; [2012] QSC 349, [24]; *Sadler v Eggmolesse* [2013] QSC 40, 1-13; *ADT v LRT* [2014] QSC 169.

"[163] The first question is: can the court be satisfied that it is reasonably likely that a person would have made any will at all if testamentary capacity had not been lost? Experience shows that some people with testamentary capacity deliberately choose to die intestate, for a variety of reasons. Should the court start from a presumption that an incapacitated person is likely to have made a will rather than die intestate?

[164] It is often said that 'the court leans against an intestacy'. However, this proposition must be understood in its context. As Lord Esher MR famously said *Re Harrison; Turner v Hellard* (1985) LR 30 Ch D 390 at 393-394:

'There is one rule of construction, which to my mind, is a golden rule, viz., that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce – that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy.'

[165] In short, the proposition that 'the court leans against an intestacy' is a rule of construction applicable only when a testator has made a valid will and the question is: what does it mean?

[166] In my opinion, in a lost capacity case in which the incapacitated person has never made a will, the court ought not to start with a presumed intention against intestacy. The court must be satisfied by the evidence that is 'reasonably likely' – in the sense of 'a fairly good chance' – that the person would have made a will at some time or other, had not testamentary incapacity supervened.

[167] For example, assume that the incapacitated person is a young man who, before suffering incapacity, held a responsible job and possessed significant assets. Assume that he has no siblings or wife and children so that his estate would go on intestacy to his parents, who are well off. Assume that he has for some years been financially supporting a friend with a severe disability. Here the court would have some information upon which to assess reasonable likelihoods: a responsible person, too young to be thinking seriously about a will but already having voluntarily assumed financial responsibility for a person who otherwise would have no claim on him. Add to this the fact that an intestacy would confer a benefit on his parents which they do not need and would withdraw from the disabled friend, who does have a need, support previously given. It is reasonably likely – in the sense of a fairly good chance – that if one had been that young man about his testamentary intentions before he was incapacitated he would have said that he would make a will at some time or other so as to provide at least some benefit to the disabled friend.

[168] To take an opposite example, assume that the person is an elderly man of means who not only dislikes his relatives but fosters disharmony amongst them. He has had ample opportunity to make a will but, despite the blandishments of hopeful relations, he has not does so. How could the court find, in such a case, that is reasonably likely

> that the incapacitated person wished to die testate rather than leave his estate to fall where it may on intestacy?
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> [169] The point I wish to make is that in a lost capacity case where no will has ever been made, there will generally be some evidence which, even though it may be slight, will satisfy the court that there is a fairly good chance that the incapacitated person either intended at some stage to make a will or else intended to die intestate. In the latter case, of course, the court will not approve a statutory will. If there is insufficient evidence for the court to form any view one way or the other, then the applicant will have failed to discharge the burden of proof which he or she bears under s 22(b) and the application must be dismissed.
>
> [170] In summary, in a lost capacity case, the court's concern under s 22(b) is with the actual, or reasonably likely, subjective intention of the incapacitated person."

[204] In relation to the "nil capacity" case however, his Honour proposes a different test in recognition of the fact that in a nil capacity case a person who has say a mental infirmity or other impairment has lost testamentary capacity well before being able to develop any notion of testamentary disposition.[113] In this case his Honour considered that the court is looking to carry out an objective assessment of likelihood rather than trying to ascertain an actual or likely subjective intention.

[205] In the case of pre-empted capacity cases his Honour considered a different approach in determining what is "reasonably likely" since a minor who has lost capacity is unlikely to have expressed a testamentary intention. The approach proposed in this case involves both subjective and objective considerations.[114]

[206] While his Honour has identified the different questions to be asked, in different situations, the test enshrined in s 22(b) provides only one test, namely, is *inter alia*, the proposed will "is or is reasonably likely to be, one that would have been made by the person if he or she had testamentary capacity". As noted by Dal Pont:

> "The neat division between 'subjective', 'objective' and the combined tests in the three categories although intuitively appealing may not be entirely accurate or precise."[115]

There is a danger in reformulating the test enshrined in the legislation. In any event, as Daubney J pointed in *Re Keane* the Queensland legislation does not provide a test of "reasonable likelihood" like New South Wales.[116]

[207] Jackson J in *VMH v SEL*[117] rejected the proposition that the court must positively answer the two questions which Palmer J in *Re: Fenwick* identified as being relevant to a lost capacity case, namely: has the incapacitated person actually expressed the

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113 *Re: Fenwick*, [171].

114 *Re: Fenwick*, [185].

115 G E Dal Pont and K F Mackie "*Law of Succession*" Lexis Nexis Butterworths, 2013, p 85.

116 (2012) 1 Qd R 319, [72] although Dal Pont considers that the Queensland test like the New South Wales test avoids the subjective focus and thus is amenable to dealing with both the 'nil capacity' and 'lost capacity cases'. I note in a case provided to me just prior to delivery of judgment, *A Limited v J* [2017] NSWSC 736 at [8] Robb J agreed with the comments of Lindsay J in *Secretary, Department of Family & Community Services v K* [2014] NSWSC 1065 at [76] that Palmer J's categories are useful but should not be taken to be a substitute for the legislation itself.

117 [2016] QSC 148.

intention attributed; and would the person have held that intention if possessed of testamentary capacity. However his Honour was considering the case where a will had been made while a party had capacity and two wills were subsequently made when the party did not have capacity.

[208] Jackson J at [123] stated:

> "However, s 21 is not conditioned on that question. The section does not expressly provide, and in my view should not be construed to mean, that if the answers to Palmer J's first question is unclear the court may not make an order."

[209] His Honour demonstrated the point by way of example:

> "[124] A simple example relevant to this case will suffice. A testator may have provided generously for a long term friend in the will, but after they lose capacity it may become apparent that the intended beneficiary has been stealing from the testator. The testator who has lost capacity is no longer able to change the will. However, there is little doubt that if they still had capacity they would have done so. The absence of actual intent is not a bar to making an order."

[210] His Honour's comment is made with respect to s 21 of the Act. Section 21 does not prescribe any condition requiring the proposed will to reflect the parties' intention. That accords with the words of the section.

[211] At [122] his Honour stated that in relation to s 24(d) of the Act that:

> "Section 23(a) requires that on the application for leave under s 22 a draft of the proposed will must be given to the court and s 24(d) requires that before granting leave the court must be satisfied that the proposed will "is or may be" a will that the person would make if they had testamentary capacity."

[212] In *VMH v SEL*,[118] Jackson J further commented:

> "The parties submit that in exercising the discretionary power under s 21 the court should aim to authorise a will that the person would have made if they had been of capacity. The validity of that consideration is recognised in the text of s 24(d). An alternative approach is that the court should authorise the will that a reasonable person of capacity in the person's position would have made having regard to the person's circumstances. That is all the court can do in some cases, because there is no reliable evidence of any relevant actual wishes."

[213] While his Honour discounted CEK's wishes in that case because he found she lacked capacity and was vulnerable to the influence of the applicant in determining the statutory will that should be authorised, he did not disregard them in their entirety.[119]

[214] Counsel for the applicant submitted that on the basis of his Honour's judgment in *Van der Meulen v Van der Meulen*[120] and *VMH v SEL* the court is considering the hypothetical circumstances that would apply and the absence of intention does not mean the court cannot make a will. She submitted that the approach to be used by the

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118 *VMH v SEL,* [148].
119 At [169].
120 [2014] QSC 33.

court was an exercise of determining the will a reasonable person with capacity would have made in the circumstances. That was supported by counsel for the litigation guardian of DAR who contended there is a mixed objective/subjective approach and counsel for CJW.

[215] Counsel for OAM contended that his Honour was in error in this regard and it is the actual person who must be considered. In this regard she submitted Jackson J had not been referred to the decision of *Re: Will of Jane*[121] and particularly the following passage:

> "The court's concern under s 22(b) is with the actual, or reasonably likely, subjective intention of the person lacking capacity. It is the specific individual person who is, or is reasonably likely to be incapable of making a will, that must be considered. It is not an objective, or hypothetical, person who is considered. The jurisdiction of the court is, so far as it possible, to make a statutory will in the terms in which a will would have been made by that person if the person had testamentary capacity at the time of the hearing of the application."

[216] Hallen AJ in *Re: Will of Jane* went on to state that:[122]

> "Whether the proposed statutory will is 'reasonably likely' must be derived from all relevant evidence and information as may be available concerning the actual intentions, attitudes and predispositions of the person in the past, by reference to what is known of his, or her, relationships, history, personality and the size of the estate. Thus, it seems, what is required is to establish the chance of an event occurring (the proposed will is one that is, or would have been reasonably likely to have been, made by the incapable person, if he, or she, had testamentary capacity) that is above mere possibility, but not so high as to be more likely than not. In other words, more is required than mere assertion, suspicion, or conjecture."

[217] It is important to note that his Honour's discussion in *VHM v SEL* was not directed to a consideration of a lost capacity case in the nature of the present case. His Honour was dealing in that case with a case where a party had a will before loss of testamentary capacity and is now said to have expressed some testamentary intention in relation to circumstances sufficient to warrant an application for statutory codicil as a new will. In that case Palmer J in *Re: Fenwick*[123] has identified that there were two questions involved in the case of alleged actual intention under s 22(h): has the incapacitated person actually exposed the intention: would the person have held that intention if possessed of testamentary capacity. It is in that context his Honour indicated that for a will being authorised under s 21 did not require it reflect the actual intention of the party. It is evident however from the passages at [122] and [148] that his Honour was dealing with the actual will having been authorised by the court. His Honour was not dealing with the "core test" in s 24(d) of the Act.

[218] His Honour did envisage that where actual intention could not be determined,[124] the exercise of determining whether in that case, the proposed changed will may be a will

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121 [2011] NSWSC 624, [73].

122 [2011] NSWSC 624, [81].

123 (2009) 76 NSWLR 22 at [158].

124 The context of his Honour's reasons is relevant given that CEK had made a will in 2015 at a time when it could not be presumed she had capacity and left in place a gift to Bobby who had been suspected of misusing CEK's money and then made a further will which only favoured the applicant in circumstances where she had become dependent on the applicant and was not counselled by the

the person would make if they had testamentary capacity, would have to be inferred having regard to the person's circumstances. That was the exercise his Honour carried out, rather than an exercise by reference to a reasonable or hypothetical person.

[219] In *Van der Meulen v Van der Meulen,* his Honour gave weight to the proposed testator's actual wishes but also gave weight to circumstances he considered would have affected those wishes if the proposed testator had had testamentary capacity.[125]

[220] I do not consider on its proper construction s 24(d) provides for an exercise to be carried out by a reference to a "hypothetical person" or "reasonable person" but rather by reference to the person themselves. The section clearly refers to the will being one that is or may be one the person would make.

[221] The provision of "may" in s 24(d) does provide for a will to be inferred by reference to matters other than just references to the proposed testator's or testatrix's intention and for the Court to draw an inference on the basis of the facts before it. This is supported by s 23 and s 25 of the Act. The approach is a similar one to that adopted by Hallen AJ in *Re Will of Jane* at [81].

[222] This is consistent with the approach adopted by Philippides J in *RKC v JNS* [2014] QSC 313 where there was no direct evidence available of the testamentary wishes given the proposed testator's disability she had little or no ability to understand and communicate her wishes.

[223] This is also consistent with the fact that the application requires the court to be satisfied that the person does not have testamentary capacity at the time of determining leave. The lack of testamentary capacity may be a matter which was lost by the person in question or which never existed. The person in question may not have ever been in a position to express any testamentary intention or wishes such as in the "nil capacity" cases.

[224] In such a case the Court's determination will depend on evidence of the relationships formed by the person in question and who is responsible for their primary care and infer whether it is a will the testator or testatrix may have made. This is consistent with the approach adopted in *Sadler v Eggmolesse.*[126]

[225] In the present case the test to be applied by the court has been identified in s 24(d) and the information to which the court is to have regard, although not exhaustive, is identified in s 23. The determination is ultimately a fact-finding exercise based on the evidence before the court.

[226] The intent of the proposed testator or testatrix is clearly a matter to which the court must have regard in making a determination under s 24(d) of the Act. This is evident from the fact that the Act provides that evidence must be provided of the wishes of the person under s 23 of the Act.

[227] The starting point is the person in question's wishes even though they do not have capacity. Naturally, the wishes of a person who does not have capacity do not carry the same weight as those of someone who does.[127] The weight to be attributed to their

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applicant against that and his position was compromised in assisting the making of the 2015 wills. As such his Honour discounted CEK's wishes insofar as they were in favour of the applicant particularly because it was not a case of recognising a long held affection or entitlement based on years of devoted support and care.

125 At [47]-[49].

126 [2013] QSC 40.

127 *VMH v SEL,* [132].

intention or expressed wishes must be determined by reference to the particular circumstances of the case.

[228] The Court must have regard to all of the evidence to determine whether the will "is or may be a will" the person has made.

[229] I was provided with further submissions by the sixth respondent after being provided with the case of *A Limited v J* by the applicant.[128] The submissions also address a case of *R v J* [2017] WASC 53. The second – fifth respondents indicate their agreement with the submissions. The sixth respondent submitted that the two cases provide some further guidance as to the whether the requirements of s 24(d) are met and in particular the task of the court. In *R v J* the court stated that the task of the Court under the Western Australian legislation is to make a will which in the court's judgment reflects an objectively proper disposition of the incapable person's estate giving weight to, but not being bound by, the wishes of the incapable person insofar as they can be reliably ascertained.[129] The test involves both subjective elements and objective elements. The test under the Western Australian legislation however is whether the will is one which "could" be made, which clearly imports such an objective assessment.

[230] In the decision of *A Limited v J*[130] Robb J considered that in the context of the New South Wales legislation the "test may be satisfied if the proposed will is one of many that the incapacitated person would have made." Again the wording is different from the Queensland legislation but there are some parallels insofar as the Court only needs to be satisfied that the proposed will is one the testator may have made if he had capacity, for s 24(d), not that it is the will the person would have made. That is consistent with the approach of this Court in *Re Matsis*[131] and *ADT v LRT*.[132]

[231] In determining whether a will is one which CGB "may" have made had he had testamentary capacity, there must be an evidentiary foundation for any such determination. The Court is required to consider what CGB would have done today if he had testamentary capacity. The court's exercise is one of evaluation based on the evidence, not one of speculation. However the broad nature of the matters to which the court has regard and the fact that the court is not bound by the rules of evidence indicate that a broad brush approach should be adopted.

[232] However, the context of a case is important and where a party had testamentary capacity and did not make a will despite being advised to do so that must be a matter weighed by the court in its consideration.

[233] I agree with Palmer J in *Re Fenwick* that where there is no will in a lost capacity case the court should not presume the proposed testator did not wish to die intestate. If in all the circumstances the court was satisfied that the proposed testator positively did not intend to make a will at all, then it is unlikely that the test in s 24(d) would be

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128 [2017] NSWSC 736.

129 Having regard to both the person's wishes and the objective considerations by reference to appropriate provision for those who might be reasonably be expected to benefit from the estate: at [31]. In that case his Honour noted the Western Australian legislation unlike other States did not refer to the likely intentions of the incapable person or to the will be reasonably likely to be one the person would have made. The Court declined to approve the proposed will for a number of reasons including that there was no reasonable basis to conclude the proposed testatrix's wishes would have included a cap of the entitlements of two daughters from her first marriage noting that the evidence as to her wishes were generally reliable and incomplete.

130 [2017] NSWSC 736 at [82].

131 [2012] QSC 349.

132 [2014] QSC 169. I reject the submission of Counsel for DAJ that the section does not envisage that there may be a range of wills that may be adopted.

satisfied[133] unless some change of circumstances arose after the proposed testator lost capacity which could support a finding that the proposed will may be one that a testator would have made if they had capacity. That is consistent with the protective nature of the jurisdiction where whatever is done or not done for and on behalf of the person in need of protection must be for the benefit and in the interests of that person. If the person in question did not intend to make a will at all having had capacity and their interests did not require protection by the imposition of a will or it would not be beneficial to them, it is difficult to envisage that the protective nature of the jurisdiction would require anything other than to respect those wishes.

Did CGB not intend to make a will at all?

[234] Counsel for the second and fifth respondent submitted that CGB did not intend to make a will at all which was demonstrated by inter alia: the fact he did not make a will prior to there being any suggestion of a loss of capacity; the fact that he revoked the "Will Instructions" which he had been advised could constitute an informal will; that he did not provide any instructions to Mr Ross to make a will and his not making a will was done in the face of advice about the effect of dying intestate. Counsel for the fifth respondent contended that the evidence showed that the evidence at its highest showed that CGB was ambivalent about whether he had a will or not.

[235] It is clear that in 2013 CGB was considering making a will and in fact took steps to that end. While it may have been prompted by pressure from PAS to do so, Mr Marshall took considerable steps to ensure if that was the case she did not interfere with the process and was not privy to his instructions. It may also have been prompted by visits by DAJ, particularly on Father's Day, or by his time spent in hospital in July 2013 which he referred to in his initial conversation with Mr Marshall. It is a matter of speculation.

[236] Whatever the catalyst, there is no doubt that meeting with Mr Marshall and providing instructions was a significant step for CGB, given advisors had tried to get CGB to make a will before and had failed. Mr Marshall was conscious of the fact that given CGB's age, capacity was an issue. Mr Marshall did not identify anything in particular indicating that he lacked capacity save that he needed to check the value of his assets with his accountant.[134] He was however, not satisfied that CGB did not suffer from any disorder of the mind affecting his decisions at their first meeting.[135]

[237] There is evidence CGB had a deterioration in his cognitive ability over the period in which he was giving instructions. At least during the period he was dealing with Mr Marshall he appeared to have good days and bad days. In this regard, Mr Marshall noted in his notes of meetings and discussions with CGB that on some days he was capable of giving instructions and others he was not.

[238] Mr Marshall did seek to test CGB's capacity at each meeting by reference to the matters outlined in *Banks v Goodfellow*. While he stated he would have required a medical certificate assessing capacity prior to the signing of the will he did not form the view that CGB lacked capacity when CGB did provide the will instructions.[136]

[239] In some ways, CGB's indecision providing instructions is unsurprising. According to the evidence of Mr Marshall and TJR, CGB had always been erratic. His empire was his legacy. His hesitancy to nominate beneficiaries for the testamentary trust appears to

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133 Or it may be inappropriate for the court to make an order under s 21 of the Act: s 24(e) of the Act.
134 Affidavit of AAM, Exh 6, p 81 (CFI 25).
135 Affidavit of AAM, Exh 6, p 82 (CFI 25).
136 T1-58/40-42.

arise not only due to the fact he did not have any people to whom he was particularly close, but also the fact his primary focus appeared to be on the fact he wished to continue his empire and money continuing to be reinvested in it rather than have anyone benefit from it.[137] Wanting to be "like Elvis" is consistent with his wanting acknowledgment from those around him of what he had achieved and not wanting to share his bounty after he was deceased.

[240] It was submitted by the applicant and joined at least by CJW's counsel that in saying he wanted to revoke the will instructions CGB was acting irrationally. They contended that CGB had been distracted by his belief that Mr Marshall had been communicating with PAS directly and had sent registered mail to his home address contrary to his instructions such that little weight should be attached to his actions on that day. While those matters did affect CGB for the reasons set out above I find that he did intend to revoke the will instructions. Although there is evidence of CGB's cognitive ability declining, Mr Marshall had tested CGB's resolve several times before writing "revoked" across the instructions and stated his behaviour that day was no different than it had been on other days as he was always challenging. He considered CGB understood the effect of the revocation.[138]

[241] I am not able to attach any significant weight to the exchanges between CGB and Mr Ross in terms of them supporting CGB's testamentary intentions. Mr Ross was trying to encourage CGB to make a will which acknowledged those who had contributed to his life and was making positive suggestions in that regard to which CGB was responding rather than him being proactive himself, save perhaps in the case of PAN's son. Mr Ross' suggestions were also made in the absence of any knowledge that CGB had children in relation to which Mr Ross said if he had known he would have advised him to be generous, Mr Ross indicated to AAM that at its highest his dealings with CGB resulted in "thoughts" that had attracted CGB[139] and he did not know CGB's actual intentions. While Mr Ross noted that CGB had a change of attitude and considered he had capacity, there is evidence of which Mr Ross was not aware that CGB's cognitive ability was declining. The process of suggestion to CGB and ideas not being hit out of the ballpark is consistent with CGB being vulnerable to suggestion, as observed by Dr King.

[242] Counsel for the applicant submitted that the testamentary instructions provided to Mr Ross were remarkably similar to those given by CGB to Mr Marshall. No such instructions were provided and insofar as it may be said the discussions indicate CGB's testamentary wishes they were markedly different from those discussed with Mr Marshall. While there was a reference to a testamentary trust and to PAS what he intended was not determined and the remainder of the matters deviated considerably from those CGB communicated to Mr Marshall.

[243] A threshold question is whether CGB would or may have made a will at all. This is a difficult issue. The facts that indicate he would or may have made a will are that:

(a) he had a large estate of diverse assets and one would expect most people in such circumstances would make a will to determine how their assets are to be distributed;

(b) he took steps to have a will prepared by engaging Mr Marshall and Mr Ross;

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137 T1-59/21-25.
138 T1-51/20-25 and 43-44.
139 T1-77/43 – T1-78/6.

(c) he contacted Mr Marshall after he had been in hospital in July 2013 and informed Mr Marshall of that fact and that he had had an infection and hallucinations suggesting he may have been cognisant of his mortality;[140]

(d) he may have been avoiding making a will because he was concerned PAS might leave him if she found out about his will; and

(e) he signed will instructions taken by Mr Marshall and contacted or asked Mr Marshall to contact PAN and CJW to be executors of his will.

[244] However weighing against those matters is:

(a) the fact that he had had advisors trying to encourage him to make a will for some 20 years and he had refused to do so;

(b) that he only pursued the question of a will when he showed signs of cognitive impairment;

(c) that he appeared to be under some pressure from PAS to make a will, which has some added significance given the opinion of Dr Till expressed in January 2014 that he was vulnerable to suggestion;

(d) that after he had given instructions for a will to Mr Marshall and signed those instructions he had sought to resile from those instructions and ultimately said to Mr Marshall that he did not wish to proceed with them and confirmed that he wanted them to be revoked when Mr Marshall told him he was going to put "revoked" across the document and subsequently did so;

(e) that in his discussions he did not appear to be concerned about any particular individuals such as PAS and ensuring that they would benefit from his estate but rather the longevity of his business empire;

(f) that he did not confide in any of his long term advisors such as TJR about a desire to make a will or whom he wished to benefit from his estate;

(g) that he had been advised on a number of occasions, including prior to showing any cognitive decline, what would occur if he died intestate, including when he and it still did not cause him to make and finalise a will; and

(h) that he toyed with solicitors and played games with them, as he did other individuals, trying to get them to do what he wanted.

[245] I reject the contention that CGB did not intend to make a will because of four matters:

(a) he took positive steps to make a will;

(b) Mr Marshall asked CGB on a number of occasions during the time they met whether he wanted a will and he indicated that he did;

(c) the fact he revoked the will instructions did not appear to be because he did not wish to have a will at all because he then discussed making a partial will with Mr Marshall straight after, although he did not commit to the instructions; and

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140 Affidavit of AAM, p 30 (CFI 32).

(d) his discussions with Mr Ross about a will subsequent to those with Mr Marshall indicates that he did want a will, notwithstanding his capacity at the time is questionable.

[246] However while I do consider CGB did wish to make a will, I find he was ambivalent about whether he did make one or died intestate.[141] He knew the effect of his dying intestate and his conduct in not accelerating or completing the will process demonstrates he was somewhat ambivalent about the importance of a will. That is consistent with his disregarding advice to make a will throughout his life when he had capacity.

[247] The question then becomes whether the proposed will is or may be a will CGB would make if he had testamentary capacity. Turning to each proposed gift in turn.

Terms of the proposed will

Gift of $450,000 to PAS

[248] The basis of the figure of $450,000 is linked to a nominated value of M St. which is the home CGB lived in and PAS lived in that capacity at least as a live in carer. The house was however sold for $550,000.

[249] PAS's evidence as to CGB's testamentary intentions is only a general statement that CGB stated he would provide for her in his will.[142]

[250] In relation to PAS, CGB consistently told Mr Marshall that he would leave her M St but was clear that he would leave her nothing else. Mr Marshall had explored with CGB in his meetings whether PAS was his de facto and also explained even if she was not that she may be able to make a claim as a dependant on CGB's estate. CGB denied any de facto relationship.

[251] Mr Marshall explained to CGB the effect of providing for a specific gift which does not remain in existence at the time of the death of the testator and he maintained the bequest was to be M St. Mr Marshall raised whether CGB wished to nominate an alternative property in case M St was sold and PAS was left with nothing. CGB instructed him that PAS was to be left M St and nothing else.

[252] M St was sold after CGB was moved to VS Aged Care Facility.

[253] PAS's counsel submitted that the amount provided for PAS in the proposed will should be increased to $2 million to provide for a house in which she could live and cash for living and for contingencies, I do not consider that CGB would or may have made a will which left her a sum of cash in addition to a house. CGB stated that he did not consider her his de facto and notwithstanding advice from Mr Marshall about the possibility of a claim under the family provisions in the *Succession Act* refused to give her anything further. He was consistent throughout that PAS was only to get M St. Further Mr Ross' suggestion to the Public Trustee in the letter of 9 August 2015 that he considered that CGB's will should provide PAS with a house and cash that would increase the longer he was at home was based on a proposal devised by Mr Ross rather than a matter which he was told by CGB. This is further supported by Mr Ross' conversation with CGB where he stated "[CGB] was shocked that [PAS] could get the house. I told him that she needs a roof over her head and dough. [CGB] was

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141 Mr Marshall didn't recall CGB expressing any concern out of dying intestate: T1-63/38-39

142 Affidavit of PAS, [40] (CFI 33).

shocked."[143] I find that PAS did get paid $1200/week some of which was used to buy food and other household needs but the remainder of which was hers.

[254] The fact CGB had limited the gift to the house at M St is consistent with the fact that while she had been his live in carer at the house for some years, she was paid an amount each week, albeit that her evidence was a large amount was used on house expenses and that she had also been paid $400,000 previously by CGB in settlement of the Family Court proceedings in 2009. The latter had been a matter discussed by Mr Marshall with CGB. CGB was aware that he had paid that sum to PAS and considered it prevented her from making any claim from his estate in his discussions with Mr Marshall when giving him instructions as to what he was prepared to leave PAS.

[255] Counsel for OAM contended that the proposed will in respect of PAS was not one that CGB would have made given that CGB was clear that PAS was only to get M St and nothing else.

[256] CGB's nomination of only leaving PAS M St, was consistent with his belief that he was never going to move from M St and that she would remain there to care for him, rather than an intention that PAS would miss out entirely if the property was sold. That is consistent with the fact that despite the volatility of their relationship he did acknowledge to Mr Marshall that she had been good to him and appeared to express some concern that she had diabetes.

[257] However subsequent to the provision of will instructions to Mr Marshall PAS has engaged in conduct identified by AAM and TJR which may be regarded as disentitling conduct. That conduct is:

(a) PAS has made an application in the Family Court to rescind the previous order made declaring they were not in a de facto relationship on the basis she was acting under duress at the time of the previous settlement;

(b) in July 2014 she apparently had her solicitor send CGB a letter informing him they were separating and claiming interim maintenance.[144] According to TJR, CGB's response to the letter was, inter alia, that there was no relationship and she was not getting his money;[145]

(c) a Domestic Violence order was obtained on behalf of CGB by his attorneys in July 2014 against PAS apparently in response to CGB telling TJR that PAS was hitting him;

(d) she had purchased a considerable amount of jewellery in 2009 – 2011 which from the receipts annexed to TJR's affidavit of receipts of jewellery purchases by PAS was in the vicinity of $333,620.[146] In this regard according to TJR cheques in the sum of 202,355 for cash withdrawals had been made on 1 July 2010 – 30 July 2011 which well exceeded the cash cheques of $60,000 per year which correlated to PAS being paid $1200/week. TJR could not identify any change in CGB's lifestyle that would have led him to draw such cheques. TJR's evidence was CGB never informed him that PAS had purchased such jewellery. There is no evidence TJR raised the matter with CGB and asked for any

143 As relayed to AAM. Affidavit of AAM, p190 (CFI 32).
144 Affidavit of TJR, exh 3 (CFI 37).
145 Affidavit of TJR, [38] (CFI 37).
146 Affidavit of TJR, exh 2 (CFI 37).

explanation. PAS denies that she took more money than the $1200/week. PAS identified the purchase of such jewellery as being one of the things she spent $400,000 settlement on. However given the other amounts identified by PAS as having been spent using the $400,000, the amount of receipts recording the amount spent on jewellery well exceeds the amount of $400,000 paid to her in 2009; and

(e) the findings of QCAT which prevent PAS having contact with CGB to which I have referred to above.

[258] On any view of the evidence CGB and PAS had had a volatile relationship with what one party described as "unparliamentary language" which had continued for 22 years. As such I do consider that the DVO and the matters giving rise to the QCAT findings alone would cause CGB to change his view as to any bequest to PAS if he had testamentary capacity.

[259] It is plain that PAS could only have paid for the jewellery from monies received from CGB as on her own evidence she was not receiving any other income. Her Counsel's explanation that it was not unusual that such jewellery would be given in an intimate relationship over twenty years is not consistent with either the time the jewellery was purchased or PAS evidence of when it was purchased.

[260] I consider that if CGB found out that PAS was taking more money than he had realised and was using it to purchase such things as jewellery that would in all likelihood have caused him to change his previous instructions and not give her anything at all. I consider it unlikely that CGB did agree to PAS receiving additional amounts utilised for jewellery and had he known she was getting additional money and using it for purchasing jewellery he would not have made further provision for her in his will. If he did know about the additional monies that would further explain his refusal to entertain providing her with any cash in his discussions with CGB. It also affects any "moral claim" based on her providing care for which it is alleged she was not adequately compensated.

[261] I consider that the relaunch of the Family Court proceedings is likely to have led to CGB deciding he would not leave her anything in his will. He had consistently denied that they were in a de facto relationship. She had agreed to a declaration to that effect and been paid $400,000 to settle the proceedings.[147] If he had testamentary capacity, I consider he would refuse to provide her with anything under his will on the basis that they had previously resolved the Family Court proceedings which provided for the fact she was to continue to live with CGB and care for him and was to make no further claim including against his estate. This is consistent with the fact he told Mr Marshall that PAS could not make a claim against the estate due to the terms of the settlement of the family court proceedings in 2009.

[262] While CGB had resolved Family Court proceedings before and notwithstanding that PAS continued to live with him, he clearly regarded those proceedings as having brought the issue to an end. I consider that if he was not dependant on her care, as is the case now, he would not leave her anything in his will on the basis that she may recover something under the Family Court proceedings. This is consistent with the fact that the evidence supports the fact that CGB is not a generous man which is evident from the circumstances in which he lived and worked on the basis he gave PAS and DAR weekly amounts and that was all.

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147 While she had continued to live at M St it is consistent with the fact she was his live in carer and he had a level of dependency on her.

[263] I am not satisfied that the proposed will in respect of the bequest to PAS is a will which is, or may be, one that CGB would have made if he had testamentary capacity.

[264] If not for the conduct of PAS in respect of the jewellery and the present family court proceedings referred to above, I consider that the proposed will would otherwise have been one which may be one that CGB would have made if he had testamentary capacity.

[265] PAS can still pursue the Family Court proceedings or a family provision application if she can establish that they were in a de facto relationship, although I accept the latter would have difficulties.

DAR is given a legacy of $350,000

[266] The bequest that is included in the proposed will in respect of DAR appears to be proposed on the basis of two matters:[148]

(a) that based on DAR's affidavit there is a question of whether he would have continued to work for CGB if representations had not been made to him about being left part of his estate notwithstanding he was paid an amount in cash each week for the work he did; and

(b) that it appears reasonable that CGB give recognition to DAR's level of commitment to him and possibly any moral and legal duties created by representations by CGB to DAR as to his deceased estate.

[267] The amount of the bequest is according to AAM based on a calculation that he should have earned $50,000 per year for a 50 hour week. It is said to be based on an hourly rate of $19.30.

[268] DAR's counsel submitted the proposed legacy was too little taking account of the representations made to DAR, the size of CGB's estate and in light of fourteen years DAR had worked for CGB and the care provided. He did not contend that any provision should be based on the calculation such as that done by AAM.

[269] Evidence was provided by both TJR and PAS that DAR worked for approximately two hours in the morning and two hours in the evening and not for ten hours a day as claimed by DAR. The estimate of ten hours a day would appear to be based on DAR working at the quarry and also personally for CGB. While DAR states he initially worked at the quarry and then provided personal carer services to CGB, that appears to have ceased by no later than 2002. I find that DAR worked 4 hours a day and a 28 hour week not a 50 hour one from at least 2002. Although he says he stayed with CGB on unspecified occasions when PAS was away. PAS evidence was that this occurred only on a couple of occasions for a short period of time. As such I do not consider it significant in the assessment.

[270] DAR in his affidavit deposes to having been told by CGB having told him on a number of occasions that he would leave him 25% of his estate. On some of those occasions DAR contends that he had been raising the fact CGB was not paying him sufficiently[149] and on other occasions DAR contends he had told CGB that lifting was taking too much of a toll on his body for him to continue.[150] When DAR visited CGB in hospital and told him he had to have back surgery for which his daughters had to pay $30,000, he contends that CGB is said to have retorted "Well you'll be able to pay them bloody

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148 Affidavit of AAM, [88] and [89] (CFI 32).
149 Affidavit of DAR, [21]-[23] and [28] (CFI 23).
150 Affidavit of DAR, [36] (CFI 23).

back once I die and you get 25% of everything".[151] According to DAR he had suffered injuries to his back as a result of lifting CGB. No medical evidence to that effect was presented.

[271] As stated above, DAR's affidavit has to be treated with a significant level of caution given that he appears to have been suffering dementia at the time it was sworn, symptoms of which included stating he had done things when he had not,[152] and has not been able to be tested as to the representations made.

[272] Given the circumstances in which DAR's affidavit was made and that the representations could not be tested in cross-examination, his evidence such representations were made, can be given little weight.

[273] Representations made during a person's lifetime that someone will get something in their will need to be treated with circumspection.[153]

[274] According to Walker J in *Gillet v Holt*[154] representations made as to a person's intention to leave something to someone in a will should be treated with circumspection given the fact that "it is notorious that some elderly person of means derive enjoyment from the possession of testamentary powers, and dropping hints as to their intentions without any question of estoppel arising."

[275] This appears to be particularly apt in the case of CGB.

[276] TJR describes CGB as a "loveable rogue" who would make promises such as those made to DAR to get people to do what he wanted without any intention of following them through.

[277] While that is a matter of TJR's opinion, no doubt based on his observations of CGB over time for which TJR provides an example, I consider that even if I could be satisfied that representations were made, the evidence of CGB's conduct is consistent with such a view.

[278] The context in which CGB's statements are said to have been made to DAR were when DAR and he were arguing as to money or when DAR was indicating he could not continue with his job for CGB. DAR's help assisted CGB to continue to live his life at M St. If CGB stated that he intended to leave him part of his estate in his will, I consider it is more likely to have been calculated to placate DAR rather than being an expression of his actual testamentary intention. There is no other evidence supporting the fact CGB intended DAR to benefit from his will.

[279] I do not find that the representations made by CGB to DAR would or may be the basis of any bequest provided to DAR if he had testamentary capacity.

[280] The question remains whether CGB would have felt some moral obligation to leave DAR something in his will. There is no evidence that CGB regarded DAR as anything other than a paid carer. As I have stated I can accord little weight to Mr Ross' thoughts as to CGB's testamentary intentions given they were matters raised by Mr Ross not CGB.

[281] DAR apparently visited CGB at the nursing home in 2016 on a couple of occasions. However there is no evidence that the relationship transcended that of a paid carer, although there was evidence that they got on well.

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151 Affidavit of DAR, [43] (CFI 23).
152 Affidavit of A Childs (CFI 39).
153 *Application of Mary-Anne Lukic* [2015] NSWSC 822.
154 [2001] Ch 210, p228.

[282] There is no doubt that like PAS, DAR gave CGB many years of service and contributed to CGB being able to stay living at M St. It was however a paid position.

[283] However other than the representations referred to above, the only suggestion that DAR should be provided for by CGB's will came from Mr Ross who had been trying to work out a formula for CGB to adopt in relation to his will which included acknowledging those who had contributed to CGB being able to continue to live at home or helped him during his life. It is evident from Mr Ross' evidence that his proposal that DAR should get one ninth of CGB's estate[155] was a matter floated by Mr Ross with CGB.

[284] No suggestion was made to Mr Marshall by CGB that he wished to leave DAR anything under his will.

[285] In relation to AAM's suggestion that given DAR's years of service that CGB would have accepted it was reasonable to provide him a gift under the will which would have been based on his receiving $50,000/year for a ten hour day. That however was based on a 50 hour week. In fact as I have found DAR worked a 28 hour week for which he was paid $26,000/year. As such it does not support the basis of the proposed will.

[286] I do not find that the proposed legacy to DAR is or may be one that CGB would make in a will if he had testamentary capacity.

TJR

[287] As set out above TJR was probably the closest person to being regarded as a friend by CGB. To the extent that CGB confided in anyone in his later years it appears to have been in TJR, although as with all of CGB's relationships it did have periods were CGB expressed distrust and anger with TJR.

[288] However the only suggestion TJR receive anything from CGB in his will came from Mr Ross not CGB. No such suggestion was made to Mr Marshall.

[289] TJR made no submissions as to any proposed legacy to him on the basis that he is administrator of CGB's estate. TJR does not get paid as administrator although he is paid for the accounting services he provides.

[290] While CGB appears to have a period of distrust of TJR in relation to a loan to his former barrister and anger at his putting him in hospital, their relationship did appear to survive. TJR continues to see CGB regularly at the nursing home and appears to be the only person who does. I note that criticisms have been made of TJR's behaviour particularly in terms of him making decisions for CGB and his treatment of PAS and DAJ, however none of those matters have any significance in relation to the present proceedings.

[291] CGB did not want anyone to get rich out of him. Given TJR is a professional man and was and is paid for his professional services, CGB would regard him as able to take care of himself even though he may have been grateful for the many years of advice and friendship.

[292] While they have a long relationship and friendship, there is no evidence which indicates to me that CGB may have made TJR a beneficiary under his will.

PAN/PAE

[293] Neither PAN nor PAE appeared to make submissions supporting any entitlement under CGB's will.

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155 Affidavit of AAM, exh 10, p181 Letter from Mr Ross to the Public Trustee (CFI 32).

[294] I have set out above the evidence in relation to PAN. Like TJR he had a long association with CGB and CGB acknowledged that he was grateful for the assistance given to him by PAN and Mr Copley to get a loan when he had not been able to secure one previously. PAN was nominated by CGB to be one of his executors in the instructions given to Mr Marshall. At the time, as set out above, CGB appeared to be angry with TJR. PAN attended CGB's residence the day he gave his will instructions to Mr Marshall and CGB had sufficient trust to allow him to stay in the room until PAN took PAS out for coffee so CGB could finish giving instructions.

[295] As in the case of TJR, CGB did not suggest to Mr Marshall that he intended to leave anything to PAN in his will, save by way of general discussion he indicated he might give PAE and PAN "a bit" in the meeting of 29 November 2013 when Mr Marshall discussed the possibility of a partial will with him after CGB had indicated he wished to revoke the previous instructions. He did not provide any instructions to Mr Marshall in that regard.

[296] Mr Ross again apparently raised with CGB the possibility of PAN being a potential beneficiary to people who he should consider providing for in his will given the assistance he had provided to him during his lifetime.[156]

[297] The evidence supports the fact that CGB was grateful to PAN for his assistance and trusted him. However at its highest his saying to Mr Marshall he might leave him "a bit" can be regarded as no more than a passing thought. As I consider there is an insufficient basis to conclude that CGB may have included any provisions in any will he would make for PAN.

[298] According to AAM, PAN told her that CGB had known PAE since he was a boy and was interested in the fact he wanted to do medicine. According to Mr Ross, CGB did express a positive desire to Mr Ross to leave something to PAE to assist him to study medicine. This is the only instance where CGB positively expressing a wish to Mr Ross rather than responding to suggestions. TJR also gave evidence that CGB expressed such a desire.[157]

[299] I consider that CGB may have made a will which included a trust in terms contained in the proposed will, because it does appear to be a desire that CGB had expressed to both Mr Ross and TJR. He had known PAE for a long period of time and according to Mr Ross had promised PAN he would assist his son. It also accords with the fact that CGB after his accident had considerable contact with the medical fraternity.

DAJ/OAM

[300] DAJ and OAM would be the beneficiaries of the estate should CGB die intestate. Both are entitled to make a family provision application under the Act. Both OAM and DAJ oppose the making of the proposed will and contend that, if made, it will almost certainly lead to a family provision application being made.

[301] There is no evidence suggesting that CGB had any intention of leaving any amount to his daughter or son.

[302] At the time that CGB told Mr Marshall about the existence of his daughter, he was still refusing to acknowledge her. This was despite having signed her birth certificate. Sadly

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156 Affidavit of AAM [48] (CFI 32).

157 Affidavit of TJR [92] (CFI 37).

in the case of OAM, CGB's dementia appears to have been well advanced and whether he had any appreciation of the fact that OAM is his son is unknown.

[303] Mr Marshall advised CGB that DAJ, as his daughter, may make a claim on his estate and he should consider providing for her in his will. CGB left the question open but never gave instructions for provision to be made, even when it was revised again by Mr Marshall.

[304] Whether a proposed will making DAJ and OAM beneficiaries under a testamentary trust is or may be a will that CGB would make is unsupported by any expressed wish or desire by him. Further there is a complete absence of any relationship between CGB and OAM or DAJ. In fact the evidence supports the fact that he did not wish to provide for DAJ at all given he did not choose to do so even when advised by Mr Marshall that he should. While CGB was not aware of OAM, there is no evidence suggesting that he would have treated OAM and DAJ any differently.

[305] The question is whether, if CGB had been made aware of the DNA evidence which confirmed they were his children and again advised that his children may make a claim against his estate, is the proposed will one he may have made?

[306] The fact that Mr Marshall had explained the implications of not having a will and the rules of intestacy on a number of occasions including after when CGB purportedly revoked his instructions lends some support to the suggestion that he may have been willing for his children to benefit from his estate. The fact he told TJR to place DAJ's unopened card somewhere safe suggests he may have been aware that a claim may be made against his estate by her.

[307] There is no doubt that CGB would be advised that he should provide for DAJ and OAM under the will. Mr Ross' evidence was that he would have advised him to be generous.

[308] Given he had not made provision for DAJ after being advised by him to do so and had not acknowledged or supported the children during their lifetime I cannot conclude he may have accepted the advice and may have made provision for them in his will.

[309] Nor am I satisfied that even if he had accepted such advice that he may have made a will by which they were beneficiaries of a testamentary trust and received a distribution of income.

[310] The basis upon which provision is made for DAJ and OAM in the proposed will is according to AAM that taking account of the potential moral claim on his estate he might reasonably have been expected to make provision for them.[158]

[311] In the present case, I am satisfied on the fairly scant evidence before me that OAM and DAJ could make such a family provision application and prima facie could satisfy the first requirement[159] of such a provision being made. The amount of what the family provision may be made is unknown.

[312] While he had not had any relationship with OAM and DAJ during his lifetime, that was not due to any fault of either of them. Given he did not accept Mr Marshall's advice in relation to DAJ and had rejected her attempts to establish a relationship with him, there is no basis upon which I can conclude he may have included provision in any will he would make if he would make if he had testamentary capacity. The notion that they would be beneficiaries of the proposed testamentary trust and be entitled to a share of

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158 Affidavit of AAM, [53] (CFI 32).

159 *Daley v Barton* [2008] QSC 228 at [146].

the funds distributed under testamentary trust is a suggestion by AAM as to how the claim by OAJ and DAJ may be addressed in CGB's will but again is a matter of speculation.

[313] Neither the applicant, OAM nor DAJ provided any analysis of what they considered what provision would be made. An amount provided under a family provision application is of course determined on a different basis to the present application. It is however a matter which this Court must consider.

[314] AAM has proposed that OAM and DAJ be included as beneficiaries of the proposed testamentary trust to address their moral claim however other than the estimated size of the assets, no assessment has been done to determine whether such a proposal would be sufficient to defeat any family provision application that OAM and DAJ may successfully bring. While the applicant contended the proposed will provides a substantial asset for the benefit of DAJ and OAM that is questionable on the evidence. The profit and loss statements prepared by TJR indicate that there would have been no profit generated last year by the properties[160] it is proposed to be included in the trust, although Mr Trevorrow expected it may generate $500,000 interest this year. This is significant given that the proposed vesting date for the trust is provided to be 80 years from the death of CGB.

[315] The proposed will was also premised on much larger estate than it appears in fact is the case. However, on any view it is a large estate. The difficulty however is while the best estimate of the assets and liabilities of the estate have been made, there are real questions as to the ability to continue the operation of the Red "CGW" Mine. The values of the mine that have been provided do not indicate that they are of significant value apart from a mine and carry the costs of such rehabilitation. The Sandstone quarry appears to be being turned around by TJR but questions as to its longevity remain. As such, it would have to draw upon other parts of the estate. The result may be such that the testamentary trust, the most valuable asset which will be R Parade, would be worth very little.

[316] If any provision that CGB may include in a will is to be on the basis of defeating such a family provision claim, the evidence does not support the fact that that would occur in the present case.

[317] I am not satisfied that the proposed will in this respect is a will which CGB may have made if he had testamentary capacity, even if I could conclude CGB may have accepted advice such provision be made.

CJW

[318] There is evidence that there was a bond between CGB and his brother CJW, particularly in their younger years. The evidence does not suggest a finding that they had not maintained strong contact in more recent years although each wished to know how the other was faring. At TJR's instigation, CJW visited CGB twice prior to his going into the nursing home, and they seem to have occasional telephone contact.

[319] CJW was a nominated executor and beneficiary of the proposed testamentary trust under the will instructions given by CGB to Mr Marshall. The provision of CJW and his descendants as beneficiary was only made after Mr Marshall had raised on a number of occasions the need to nominate beneficiaries of the testamentary trust. After CGB and his descendants were nominated as beneficiaries of the testamentary trust in the 'will instructions' he expressed uncertainty as to whether that was his wish. CGB

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160 Submissions of DAJ, [35](a).

subsequently revoked those instructions. Mr Ross' evidence was that in his discussion with CGB they discussed CGW as an executor but not as a possible beneficiary under the will.

[320] While there was reference to CJW's descendants in the will instructions, there is no evidence that he had any relationship with CJW's children at all. The reference seems likely to have been made on the basis of trying to name beneficiaries who could survive the term of the trust, rather than any testamentary intention to benefit the children individually.

[321] I do not consider however any provision in his will would be as a beneficiary of a testamentary trust. I consider the question of the testamentary trust further below.

[322] CJW's legal representatives submitted that the benefit for CJW should be seen as best being provided by a direct gift rather than through a long term trust entitlement where discretionary elements might see the failure of the wishes of the testator. It is contended that the issues of the vulnerability, suggestibility and distractibility of the testator stemming from his dementia have clearly played a role in the failure of the testator to provide in an appropriate manner by a formal will for those whom he wished to benefit.

[323] I don't consider that CGB failed to provide a more appropriate manner for those whom he wished to benefit was due to the matters contended. CGB at the time of focussing on the testamentary trust was focussed on perpetuating his business empire rather than the beneficiaries. His nominating CGW and his descendants was only after Mr Marshall pressed him on the need to nominate beneficiaries of such a trust.

[324] CJW was not discussed by CGB as a potential beneficiary with Bill Ross. That may have however been due to CGB's declining cognitive state rather than a lack of testamentary wish to provide CGW with a benefit under the will.

[325] Given CGB, at TJR's instigation, gave CJW money and a car previously and CGW is now in a nursing home and on the pension I consider that CGB may make some provision for CJW now if he was aware of CJW's present poor state, if he had testamentary capacity however it would not be a significant sum. While it is a matter of speculation I would not consider it would be greater than $100,000.

Charity

[326] I also do not consider that he would or may have made a will which provided for money to be provided to the Spinal Research Unit. He had told Mr Marshall he did not wish to leave anything to charity. The suggestion of leaving money to the Spinal Research Unit was one that Mr Ross raised given the time CGB had spent in the spinal unit at the Princess Alexandra Hospital and according to Mr Ross the suggestion was not hit out of the ballpark. However Mr Ross gave evidence that they were no more than thoughts. CGB was at this time vulnerable to suggestions of others according to Dr Till. While Mr Ross' suggestion to CGB was based on his time in the Princess Alexandra spinal unit,[161] CGB was not a generous man who indicated any desire to give support to charities.

[327] The role of this court is not to determine the will that CGB should make.

[328] While the Spinal Research Unit would be a worthy recipient there is no basis to conclude that CGB would or may have left money to any charity if he had testamentary capacity.

Testamentary Trust

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161 Affidavit of AAM, [54] (CFI 32).

[329] CGB made comments that indicated he wanted to be immortal. Thus the testamentary trust appealed to him because he wanted to remain like Elvis and for his legacy to live on. However he subsequently indicated that he did not wish to proceed with the testamentary trust with Mr Marshall and did so prior to the incident where his will was revoked.

[330] The applicant submitted that CGB raised the prospect of his estate continuing like Elvis after he had purported to revoke his will instructions.[162] Assuming the reference is correct it is based on an entry on 4 November 2013 which is prior to his purporting to revoke his will instructions. Mr Marshall however noted that on 4 November that CGB was unsure about what he wanted in the will including the reference to CJW and CJW's children being beneficiaries.[163]

[331] Mr Marshall's evidence was that while he and CGB had discussed the idea of the testamentary trust, he never got to the point of explaining to CGB how the trust would actually work and finalising the actual testamentary trust with him.[164]

[332] AAM obtained some tax advice from Whitehills Chartered Accountants & Advisors but only as to whether the will allowed for potential taxation considerations arising from CGB's estate. There does not appear to be any asset protection or other commercial basis for suggesting that CGB would have made a will which included a testamentary trust or been advised to do so.

[333] I consider the suggestion of a testamentary trust was a grandiose idea of CGB's based on his wish to live forever. He had told Mr Marshall prior to revoking his will instructions orally that he did not wish to continue with the notion. That was at the same time he told him he had seen CGW and that he was not going so well. He subsequently told Mr Marshall in the meeting of 29 November that he did not wish to make a will in terms of the 'will instructions' and confirmed to Mr Marshall and Ms Stewart he wished to revoke them.

[334] While the notion of the Red "CGB" Mine trust was raised in discussions between CGB and Mr Ross it appeared to go no further than that and constitute more than a thought.

[335] On the basis of the evidence and the revocation of the will instructions I do not find that the will CGB may make if he had testamentary capacity would include a testamentary trust.

Can the court make orders as to the proposed will on different terms from the terms proposed?

[336] On the basis of the above consideration, I am not satisfied on the balance of probabilities that the proposed will is or may be one that CGB would make if he had testamentary capacity.

[337] While the Court may give leave on conditions and direct that changes to the proposed will be made, the present case does not lend itself to such a direction. I have concluded that the terms of the proposed will are not in the number of respects a will that may be a will that CGB would make if he had testamentary capacity to do so. Nor have I been able to determine the will that CGB may make if he had testamentary capacity in relation to the vast bulk of his estate. The evidence as to what CGB would have done with the vast amount of his estate is not something that can be determined. CGB's

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162 Applicant's Outline of Submissions, [42].

163 T1-461/10-22. This is consistent with the fact CGB did not in his discussions with Mr Ross about Wally suggest he should be a beneficiary.

164 T1-44/10-15, T1-62/9-12.

interactions with Mr Marshall demonstrate that CGB himself did not know what he wanted to do with his estate and that he was indifferent to dying intestate credible.

Is it appropriate for an order to be made under s 21 in relation to the person?

[338] Even had I been satisfied that the proposed will was one which CGB may have made, I would not consider that it is or may be appropriate for the court to make an order under s 21.

[339] According to the Court of Appeal in *GAU v GAV*:[165]

> "[49] The scope of operation of clause 24(e) is to be discerned against that background and by reference to the words of the provision itself. It is clear from those words that the court need be satisfied that an order under s 21 is, or may be, appropriate, and no more. The court need not be satisfied that such an order is appropriate; satisfaction that it may be appropriate will suffice. The nature and extent of the enquiry the court need undertake is so informed: the enquiry need only be one that is sufficient for the court to be satisfied as to appropriateness of making an order under s 21, at either level. Where the court is not satisfied at either level, it may not give leave.
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> [50] The court undertakes the enquiry with regard to the information provided to it pursuant to s 23. As Lindsay J also observed, that information is designed to allow the court to be placed in the position to make broad evaluative judgments about the personal, and family, circumstances of the person alteration of whose will is sought.
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> [51] Speaking of those specified matters in the context of the New South Wales legislation, Palmer J noted in Re Fenwick:
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> 'Section 22(c) gives no guidance as to what circumstances, in addition to those set out in the other paragraphs of the section, are to be taken into account in determining whether a final order, is 'appropriate'. Section 19(2) gives an indication of some such circumstances but the generality of s 22(c) makes it clear that s 19(2) is not intended to be an exhaustive check list.
>
> Some of the requirements of s 19(2) are so obvious that they need no elaboration; others require a little examination.'
>
> Paragraphs (e) and (g) in s 19(2) provide the court with the means of taking into account the incapacitated person's wishes, if known. However, as I have earlier remarked, the court must, under s 22(c), assess objectively whether, and to what extent, it is 'appropriate' to accede to those wishes. The court must be sure that the incapacitated person's expressed wish is not irrational or the product of pressure or influence.
>
> [52] Thus, the assessment at the leave stage of appropriateness of making an order under s 21 is made objectively with reference to the matters given to the court pursuant to s 23 and such other matters as the court considers relevant. Importantly, it is undertaken with conscious regard for the fact that making an order under s 21 is an exercise of a

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165 [2014] QCA 308.

jurisdiction which is protective in nature and informed by what is for the benefit, and in the interests, of the person who requires protection."

[340] In the present case I not consider that an order may be appropriate for these reasons:

(a) in making the proposed will with or without provision for OAM and DAJ there is likely to be a family provision application. Both oppose the making of the proposed will and have indicated that the making of a family provision application by them is likely;

(b) even if a will was made in the terms proposed, the evidence is not adequate to assess whether it would be sufficient to avoid a defend a family provision application;

(c) even if provision was made for OAM and DAJ on the basis of the testamentary trust, the evidence as to the position of the assets in respect of Red "CGB" Mine and SQ Pty Ltd is such that they could receive substantially less than would otherwise be received under a family provision application and certainly on intestacy;

(d) the court's role is not to make a statutory will which would almost certainly head to further litigation,[166] as opposed to avoiding them;[167]

(e) his dying intestate was a matter of indifference to him; and

(f) he was experiencing cognitive decline before the time he began to express any testamentary wishes bringing into question his capacity to give those instructions albeit Mr Marshall tested CGB when obtaining instructions and Mr Ross considered CGB had capacity but neither had been made aware of the reports of Dr Till.

[341] The protective nature of the court's jurisdiction is a paramount consideration in relation to applications such as the present. I have considered carefully the fact that CGB is a man of considerable wealth who will leave a large estate. While it is undesirable for a person in CGB's position to die intestate, CGB is an unusual man.

[342] Throughout his life and when he had unquestionable capacity, he never made a will despite advice to do so, prior to his taking steps in 2013. Even then, he was indifferent to the prospect of dying intestate when given advice as to the effect of intestacy. This was even after he had become aware that DAJ was claiming to be his daughter. While he disclaimed the relationship he had signed DAJ's birth certificate and told TJR to put her unopened card with his papers. In the circumstances, if CGB were to die intestate it is not a case where it would be contrary to his stated wishes insofar as his conduct indicated he was prepared to die intestate if he did not make a will.

[343] The will is not one required to protect his interests or to benefit him, now that he is in a nursing home and provision is being made for his care and there are administrators who are maintaining his estate. CGB's apparently equivocal attitude as to whether he had a will or not is consistent with the impression of Mr Marshall that CGB did not know where he wanted his estate to go, even after he had signed the will instructions. It is also consistent with the fact that he revoked the will instructions given to Mr Marshall that he wished to revoke the will instructions he had previously made. The discussions with Mr Ross did not provide any reliable evidence as to CGB's intentions, testamentary wishes or intentions. TRJ did not consider that CGB dying intestate was

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166 *Re: Fenwick* at 194.

167 *Danzig v Loel*, unreported, QSC Lyons J 25/2/15.

inconsistent with his position and did not consider the position that he had understood CGB to have adopted throughout his life.

[344] While I did consider that in the case of PAN's son and CJW that if CGB may have made a will if he had testamentary capacity from which they would benefit, neither PAN nor his son gave evidence or appeared to support any claim upon the estate of CGB. In the case of CJW I do not consider that he would have been left a large part of CGB's estate given his age and failing health and any amount that would be a matter of speculation as to what may have been provided for him in the will, given the fact I have found that CGB did not contend to continue with the testamentary trust as discussed with Mr Marshall.

[345] For the reasons set out above I do not consider that the will proposed in this case should be made by the court. Leave is not granted.

De-identification

[346] The applicant submitted that this is a case where it is appropriate that any reasons be published in de-identified form. Such orders have been made to protect the individual's privacy, dignity and vulnerability.[168] I consider that it is appropriate to make such an order that all references whereby the testator would or could be identified in these reasons be de-identified so as to protect the testator's privacy and dignity.

Costs

[347] Pursuant to s 21(2) the court may order the costs for either or both an application under s 21 or on an application for claim to be paid out of the person's estate. All parties submitted they should be paid their costs. Although unsuccessful, it was appropriate that for the application to be made and that all parties appeared.

[348] Accordingly I order all parties' costs be paid out of CGB's assets on an indemnity basis.

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168 *SPM v LWA* [2013] QSC 138; *RE JT* [2014] QSC 163 at [40].